90-1360

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SEA-LAND SERVICE, INC.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether Congress, in enacting the Shipping Act of 1916, 46 U.S.C. App. § 801, *et seq.*, and the Suits in Admiralty Act, 46 U.S.C. App. § 741 *et seq.*, intended that the absolute waiver of sovereign immunity of the United States in maritime actions based on the unseaworthiness of its vessels was to be limited by a discretionary function exception.

2. Whether constitutional principles of separation of powers require that the judicial branch of the United States imply a discretionary function exception to the doctrine of unseaworthiness in maritime actions against the United States.

3. Whether this Court should resolve the clear and substantial conflict which exists among the circuits as to whether a discretionary function exception must as a matter of constitutional law be implied into the Suits in Admiralty Act.

LIST OF PARTIES

The parties to this proceeding are Sea-Land Service, Inc., Petitioner, and the United States of America, Respondent. Pursuant to Supreme Court Rule 29.1, Petitioner's parent and subsidiaries are set out at page 51a of the Appendix.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, which is reported at 919 F.2d 888, is reprinted at pages 1-12a of the Appendix. The opinion of the United States District Court for the District of New Jersey (Wolin, J.), which is not officially reported, is reprinted at pages 13-22a of the Appendix.

JURISDICTION

Invoking federal jurisdiction pursuant to, *inter alia*, the Suits in Admiralty Act, Petitioner brought this action in the United States District Court for the District of New Jersey. On December 20, 1989, the district court granted Respondent's motion to dismiss for lack of subject matter jurisdiction. That motion argued that actions brought pursuant to the Suits in Admiralty Act were subject to the discretionary function exception of the Federal Tort Claims Act, 26 U.S.C. § 2680(a).

On Petitioner's appeal, the United States Court of Appeals for the Third Circuit on November 29, 1990 entered a judgment and opinion affirming the district court's order (Appendix pp. 1-12a). Jurisdiction of the Court of Appeals was pursuant to 28 U.S.C. § 1291.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition involves Article 1, § 8, cl. 18 of the Constitution, and the Shipping Act of 1916, ch. 451, 39 Stat. 728-38 (current version at 46 U.S.C. App. §§ 741-52), the Federal Tort Claims Act, 26 U.S.C. §§ 1346(b) and 2680(a), the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, the War Shipping Administration (Clarification) Act of 1943, 50 U.S.C. App. § 1291, and the Tucker Act, 28 U.S.C. § 1346(a)(2). The pertinent text of those provisions and statutes are reprinted at pages 44-50a of the Appendix.

STATEMENT OF THE CASE

Petitioner Sea-Land Service, Inc. (hereinafter "Sea-Land" or "Petitioner") commenced this maritime contribution action against the United States pursuant to, *inter alia*, the Suits in Admiralty Act (hereinafter "SAA") to recover the proportionate share of the United States' liability for amounts paid by Sea-Land in settlement of a wrongful death action commenced in the New York State Supreme Court. That wrongful death action was brought to recover damages arising from the death of David Swogger, a marine engineer who died in 1980 from mesothelioma, a fatal lung disease that has been specifically linked to asbestos exposure.

The complaint in the wrongful death action, which set forth causes of action for negligence under the Jones Act and unseaworthiness under the general maritime law, alleged that while working as a marine engineer during the years 1949 to 1978 aboard thirteen vessels owned by the five named shipowner defendants, including Petitioner, David Swogger was exposed to asbestos-containing products. Petitioner Sea-Land's complaint in this action against the United States alleges, *inter alia*, that David Swogger's death was also caused, in whole or in part, by his service aboard unseaworthy merchant vessels designed, constructed, operated and owned by the United States during an earlier period from

January 16, 1943 to May 22, 1948, a period specifically excluded from the wrongful death action complaint.

Since commencement of this action on June 24, 1987 there have been virtually no pre-trial proceedings conducted except for two motions to dismiss made by the United States, and subsequent appeals from the district court's orders granting each of those motions. The first motion sought dismissal on the ground that Sea-Land's action was time-barred pursuant to the two-year statute of limitations contained in Section 5 of the SAA, 46 U.S.C. § 745. By order dated July 13, 1988, the district court dismissed Sea-Land's action on the ground that it lacked subject matter jurisdiction. In its decision, which is reported at 689 F. Supp. 450 (reprinted at pp. 34-43a of the Appendix), the district court concluded that a maritime contribution cause of action against the United States accrues not when the contribution action plaintiff, e.g., Sea-Land, makes payment on the underlying claim, as it would in contribution actions between private maritime litigants, but rather when the underlying injury occurred. 689 F. Supp. at 452-4 (Appendix pp. 39-43a).

In its opinion reversing the district court, reported at 874 F.2d 169 and reprinted at pp. 23-33a of the Appendix, the Court of Appeals held that its analytical "touchstone" was the intent of Congress in passing the SAA. The Court of Appeals concluded that the text of the statute itself clearly showed that the intent was to make the United States liable in maritime actions to the same extent as private shipowners would be liable. 894 F.2d at 172 (Appendix 29-31a). Significantly, the court noted that "[w]hile the government stresses that the general rule [regarding accrual] can result in a very extended exposure for it, that exposure is no greater than that of other shipowners." 874 F.2d at 173 (Appendix p. 31a).

In its decision for which Petitioner Sea-Land seeks the issuance of a writ of certiorari, the Court of Appeals disregarded the explicit text of the SAA, as well as the undeniable congressional intent which the court itself had already

acknowledged. The court below judicially legislated into the statute an exception to the maritime liability of the United States which is clearly not applicable to private shipowners such as Sea-Land. In so doing, the Court of Appeals accepted the argument advanced by the United States that the judicial "implication" of a discretionary function exception into the SAA was required by the constitutional doctrine of separation of powers.

As a result of that decision, as well as other decisions, the maritime liability of the United States as a shipowner has been drastically limited. Although the discretionary function exception has been asserted primarily in cases involving seamen exposed to asbestos aboard merchant vessels owned and operated by the United States, it is clear that the United States has now been granted judicial imprimatur to invoke the exception in any case where government "discretion" might be involved. Moreover, the holding that a discretionary function exception must be implied into the SAA for constitutional reasons mandates that the exception be applied by the courts in all maritime actions brought against the United States pursuant to that statute—whether or not the exception is invoked by the government. Such a broad and undefined judicial limitation on the legislative waiver of sovereign immunity in maritime matters should not be countenanced by this Court.

REASONS FOR GRANTING THE WRIT

POINT I

THE COURT OF APPEALS DISREGARDED THE CLEAR INTENT OF CONGRESS IN ENACTING THE SAA

The absolute waiver of the United States' sovereign immunity in maritime and admiralty actions has long been acknowledged by this Court. *See, e.g., United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976); *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215 (1945); *Eastern Transp. Co. v. United States*, 272 U.S. 675 (1927); *The Lake Monroe*, 250 U.S. 246 (1919). That waiver has its genesis with the Shipping Act of 1916, ch. 451, 39 Stat. 728-38 (current version at 46 U.S.C. App. §§ 801-42), which was enacted by Congress for the purpose "of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States. . . ," *The Lake Monroe*, 250 U.S. at 250. To encourage the use of vessels owned by the government, Congress determined that it was "essential" to subject United States vessels "to the same duties and liabilities as privately owned merchant vessels with which they competed." 250 U.S. at 255. To ensure that result, Section 9 of the Shipping Act, 46 U.S.C. App. § 808 (Appendix pp. 48-49a), provided that merchant vessels operated by the United States "should be subject to all laws, regulations, and liabilities governing merchant vessels. . . ," 250 U.S. at 254-55.

The scope of that waiver was at issue in *The Lake Monroe*. There the United States sought a writ of prohibition or mandamus preventing a district court in Massachusetts from ordering the maritime arrest of the SS Lake Monroe, a vessel owned and operated by the government. The Lake Monroe had been in a collision with a private fishing vessel, and an *in rem* action had been commenced on behalf of that vessel to recover damages arising from the collision. The United States

appeared on behalf of the Lake Monroe and argued that, because the Lake Monroe "was the property of the United States and in its possession and control, the court was without jurisdiction to enforce claims against her by process." 250 U.S. at 248.

In rejecting that argument this Court found the congressional intent of § 9 of the Shipping Act—to subject United States merchant vessels to the same duties and liabilities as those imposed upon privately owned merchant vessels—to be clear:

> Her service at the time was purely commercial, and she was subject by the terms of the act to the ordinary liability of a merchant vessel, notwithstanding the indirect interest of the Government in the outcome of her voyage.
>
> We deem it clear, also, that among the liabilities designated by the section is the liability of a merchant vessel to be subjected to judicial process in admiralty for the consequences of a collision.

Id. at 256.[1] Subsequently, the waiver of sovereign immunity was also held to apply where it could be said that the United

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1 Significantly, the Lake Monroe was a vessel which had been requisitioned by the United States while still under construction pursuant to emergency legislation enacted after the declaration of war by the United States on April 6, 1917. This legislation gave the President broad powers with regard to the construction and requisitioning of vessels to assist in the war effort. At the time of the collision, the vessel was being operated in merchant trade on behalf of the United States by private agents. *The Lake Monroe*, 250 U.S. at 251-53. All of the courts, including the court below, which have dismissed maritime asbestos actions against the United States on the basis of an "implied" discretionary function exception in the Suits in Admiralty Act have done so on the ground that the construction and operation of vessels containing asbestos during and after World War II, including those operated in a merchant capacity by general agents, were "discretionary functions" arising from the Executive's war prosecution powers. *Sea-Land Service, Inc. v. United States*, 919 F.2d 888, 892 (3d Cir. 1990) (Appendix pp. 9-10a); *In Re Joint E. & So. Dist. Asbestos Lit.*, 891 F.2d 31, 37 (2d Cir. 1989); *Gordon v. Lykes Bros. S.S. Co., Inc.*, 835 F.2d 96, 100 (5th Cir.), *cert. denied*, 488

States had a "direct" interest in the vessel's trade. *See e.g.*, *The Nishmaha*, 263 F. 959 (D. Or. 1920).

The decision in *The Lake Monroe* merely confirmed what the plain language of the Shipping Act stated, i.e., that Congress, in an effort to stimulate the commercial growth of the shipping fleet operated by the United States, intended to and did waive the sovereign immunity of the United States to suits arising from its operation of that fleet. One consequence of acting as a private shipowner, however, was that vessels owned and operated by the United States were now subject to suits *in rem*. Historically an action *in rem* was available to ensure that a successful libellant had an asset of the defendant against which he could execute and enforce a judgment. That security was not necessary for suits against the United States. Moreover, having its vessels rendered unavailable by virtue of a maritime arrest did not serve the commercial purposes of the United States. S. Rep. No. 223, 66th Cong. 1st Sess. (1919); 58 Cong. Rec. 7317 (1919); *Authorizing Suits Against the United States in Admiralty: Hearings on H.R. 7124 Before the House Comm. on the Judiciary*, 66th Cong., 1st Sess., Ser. 4 (1919) (Statement of Ira A. Campbell, Special Asst. to the Attorney General in Charge of Admiralty Litigation); 59 Cong. Rec. 1678-80 (1920).

The Suits in Admiralty Act, ch. 95, 41 Stat. 525-28 (current version at 46 U.S.C. App. §§ 741-52) was therefore enacted on March 9, 1920 for the purpose of putting an end to the "embarrassment" and "expense" arising from the arrest of United States operated merchant vessels pursuant to the authority of *The Lake Monroe*. *United Continental Tuna*, 425 U.S. at 170; *Canadian Aviator*, 324 U.S. at 219-20; *Shewan & Sons v. United States*, 266 U.S. 108, 111 (1924);

U.S. 825 (1988). Such a "wartime" construction and operation exception from maritime liability was surely not recognized by this Court in *The Lake Monroe*. In fact, in *Calmar S.S. Corp. v. United States*, 345 U.S. 446, 456 (1953), this Court specifically held that the waiver of sovereign immunity with respect to the government's operation of merchant vessels applied even when the vessel was on a "war mission."

Blamberg Brothers v. United States, 260 U.S. 452, 458-59 (1923); S. Rep. No. 223, 66th Cong. 1st. Sess. (1919). The SAA provided that while an *in rem* arrest action could no longer be maintained against a government merchant vessel, an *in personam* action for damages could be brought "against the government in any case where if the government merchant vessel were privately owned or operated a 'proceeding in admiralty' could be maintained." *Canadian Aviator*, 324 U.S. at 219-20. In *Eastern Transp. Co. v. United States*, 272 U.S. 675 (1927), this Court stated that while the principal purpose of the SAA was to relieve United States merchant vessels from *in rem* arrest proceedings, its provisions could not be interpreted to limit its application to only actions where an *in rem* remedy was sought in an *in personam* action. Accordingly, it was held in that case that the SAA also recognized "the general *in personam* liability of the United States as the owner of an offending vessel, like that of a private shipowner." 272 U.S. at 690. It was specifically noted that § 6 of the SAA, 46 U.S.C. App. § 746 (Appendix p. 48a), supported the Court's conclusion for, in that section, Congress provided that the United States would be entitled to "the benefits of all exemptions and of all limitations of liability accorded by law" to private vessel owners and operators. The "necessary implication" of § 6 was that if the United States could not in any particular case show that its liability should be exempted or limited by statutes applicable to private shipowners, "it must assume the personal liability for negligence in such cases *exactly* as a private owner would." 272 U.S. 690-91 (emphasis added).[2]

In enacting the Shipping Act and the SAA, it was Congress' intent to put the United States "in the shoes" of a private shipowner with respect to maritime liabilities and

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2 The last statute enacted by Congress with respect to the waiver of sovereign immunity in maritime matters was the Public Vessels Act, March 3, 1925, ch. 428, 43 Stat. 1112-13 (current version at 46 U.S.C. App. §§ 781-90). This act applies to suits against the United States arising from damages caused by public vessels. *See generally*, *Canadian Aviator*, 324 U.S. at 221-26; *United Continental Tuna*, 425 U.S. at 171-72. The applicability of this statute is not at issue herein.

limitations. Those liabilities and limitations were clear when Congress considered and enacted those statutes.[3] Undoubtedly, it had been established by this Court well before the enactment of the Shipping Act of 1916 that a shipowner's liability for damages included liability arising from a breach of the absolute warranty of seaworthiness. Such liability extended not only to damage caused to cargo by latent defects creating unseaworthy conditions, *The Caledonia*, 157 U.S. 124 (1895), but, more importantly to the case at bar, to personal injuries sustained by crewmembers as a result of unseaworthy conditions. As this Court stated in *The Osceola*, 189 U.S. 158 (1903):

> Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:
>
> . . .
>
> 2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff v. Metcalf*, 107 N.Y. 211.

Id. at 175. *See also*, *Chelentis v. Luckenbach S.S. Co., Inc.*, 247 U.S. 372, 380-81 (1918) (holding that the rights of a seaman to recover damages from the shipowner were governed exclusively by the settled principles of the general maritime law and not by common law standards); *McDermott Int'l, Inc. v. Wilander*, 59 U.S.L.W. 4091 (U.S. 2/19/91) (No. 89-1474).

Subsequent to this Court's decision in *The Osceola*, and prior to the enactment of the SAA, there were numerous decisions in which seamen were awarded damages from ship-

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3 The relevant inquiry is what Congress considered the state of the law to be when it enacted the Shipping Act and the SAA. *Brown v. General Services Administration*, 425 U.S. 820, 829 (1976). As this Court recently stated, "[w]e assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 112 L.Ed.2d 275, 291 (1990).

owners based upon findings that defective equipment created unseaworthy conditions. *See, e.g., The Colusa*, 248 F. 21, 24 (9th Cir. 1918) (turnbuckle); *Globe S.S. Co. v. Moss*, 245 F. 54 (6th Cir. 1917) (feedpump); *The Fullerton*, 167 F. 1 (9th Cir. 1908) (anchor chain). Surely, by the time David Swogger first sailed aboard a government operated vessel in or about 1943, a shipowner's liability based upon unseaworthiness was undeniable:

> But the admiralty rule that the vessel and owner are liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment, has been the settled law since this Court's ruling to that effect in *The Osceola*, *supra*, 175.

Mahnich v. Southern S.S. Co., 321 U.S. 96, 99 (1944). *See also, Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 (1946); *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 258-59 (1922).

Moreover, the principle that a shipowner was subject to liability based upon unseaworthy conditions existing aboard its vessel was not only recognized by Congress when the SAA was debated, but extending that maritime liability to the United States was deemed critical to carry out the intent of the statute as well as the Shipping Act. The initial legislation which was to become the SAA was drafted by Ira A. Campbell. From May 1918 through August 1919 Mr. Campbell was admiralty counsel of the United States Shipping Board, and from September 1918 until September 1919 he was also special assistant to the United States Attorney General in charge of maritime and admiralty matters. He testified extensively before committees of both Houses of Congress in support of the Bill:

> We are faced with two conditions: First, the necessity of providing machinery by which the Government can properly take care of this rapidly increasing volume of litigation; secondly, the advisability of the Government creating and making clear these liabilities on the part of these vessels, because, so far as merchant vessels are

> concerned, if the United States is going to compete in commercial trades, it has got to subject such vessels to exactly the same liabilities as privately owned vessels.
>
> . . .
>
> If the shipper shipped upon a Shipping Board vessel and knew that when the vessel arrived in port with his cargo damaged from unseaworthiness, he did not have the same remedy available to enforce the collection of his damages, very naturally he would give preference to the English vessel every time. The result would be a discrimination in freight and insurance rates and the like of that, so I think you will find the unanimous judgment of all who have anything to do with the Government operation of these vessels is that these vessels must be placed upon a par with the privately owned vessel, so far as liability for damages is concerned.

Suits in Admiralty Against the United States: Hearings on S. 2253 Before the Senate Committee on Commerce, 66th Cong., 1st Sess. 14-15 (1919) (Statement of Ira A. Campbell). His statements reflect the view of the Executive Branch that a complete waiver of sovereign immunity was critical if the United States was to compete effectively in the world market. A review of the debate in the Committees of both Houses reveals that Congress was keenly aware of the absolute waiver of sovereign immunity granted by the Shipping Act of 1916 and recognized by this Court in *The Lake Monroe*. The debate with respect to the SAA focused, not on a repeal of that immunity, but on two ancillary but practical issues: (i) eliminating the ability of libellants to arrest United States vessels; and, (ii) extending the waiver granted by the Shipping Act to include, in addition to merchant vessels, vessels of the United States Navy.[4]

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4 S. Rep. No. 223, 66th Cong. 1st Sess. (1919); *Authorizing Suits Against the United States in Admiralty: Hearings on H.R. 7124 Before the House Comm. on the Judiciary*, 66th Cong., 1st Sess., Ser. 4 (1919) (Statement of Ira A. Campbell, Special Asst. to the Attorney General in Charge of

Clearly, the Congress and the Executive were intent on a policy which would stimulate United States shipping. Both Branches recognized that the successful implementation of that policy required that the United States waive its sovereign immunity and subject itself to suit as if it were a private shipowner.

The decision below ignored the clear purpose behind the waiver of sovereign immunity in maritime matters and, relying on the constitutional principle of separation of powers, held that Sea-Land's maritime contribution rights against the United States were subject to a judicially implied limitation.[5] However, Congress specifically provided that Sea-Land's contribution action against the United States pursuant to the

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Admiralty Litigation); *Suits in Admiralty Against the United States: Hearings on S. 2253 Before the Senate Comm. on Commerce*, 66th Cong., 1st Sess. (1919) (Statement of Ira A. Campbell, Special Asst. to the Attorney General in Admiralty); 58 Cong. Rec. 7317-18, 7439-40 (1919); 59 Cong. Rec. 1678-80, 1685-88, 1693, 1751-58, 3629-31 (1920).

5 It is significant to note that the effect of the Court of Appeals' decision is to also eliminate, *based upon constitutional principles*, all remedies of seamen who sailed aboard government operated vessels during World War II where their injuries could be said to have been the result of a discretionary decision or act. Concurrent with the enactment of the Shipping Act of 1916, the Congress enacted the Federal Employees' Compensation Act ("FECA"), Sept. 7, 1916, ch. 458, 39 Stat. 742 (current version at 5 U.S.C. § 8101 *et seq.*). In 1943 Congress enacted the War Shipping Administration (Clarification) Act, 50 U.S.C. App. § 1291 (Appendix pp. 49-50a), which provided that seamen who were employed aboard War Shipping Administration vessels were to "have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels". Significantly, the Clarification Act also provided: (a) that seamen covered by it were not entitled to compensation under FECA; and (b) that its rights were to be enforced pursuant to the Suits in Admiralty Act. Accordingly, the decision of the Court of Appeals, implying into the SAA a discretionary function exception, effectively eliminates the remedies of those seamen exposed to asbestos or other dangerous conditions aboard vessels owned by the United States during World War II because, as this Court has held, the United States is the only proper defendant in suits governed by the SAA. *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783 (1949).

provisions of the SAA is to "be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." 46 U.S.C. App. § 743 (Appendix pp. 46-47a). Such principles of law include the liability of a shipowner for injuries resulting from unseaworthy conditions aboard its vessels (pp. 9-10, *supra*), and the right to contribution among joint maritime tort-feasors. *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1973). Those well-established principles of the maritime law are equally applicable to the United States by virtue of the waivers of sovereign immunity in maritime actions. *Cf. Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597 (1963).

The decision below is therefore contrary to the plain language of the statute and to the expressed intent of Congress.

POINT II

SEPARATION OF POWERS PRINCIPLES DO NOT SUPPORT THE COURT OF APPEALS MISCONSTRUCTION OF THE SAA

This petition establishes (Point I) that Congress, first in the Shipping Act of 1916 and again in the SAA of 1920, imposed on the United States liability to the same extent as if its merchant vessels were privately owned. It establishes, further, that such liability included the doctrine of unseaworthiness, a variety of strict liability which includes conditions on vessels resulting from the design of the vessel. It establishes, as well, that contemporaneously with the enactment of the Shipping Act of 1916, Congress enacted the Federal Employees' Compensation Act, which also imposes strict liability for personal injuries, including injuries arising from design of workplace or equipment. Finally, this petition establishes that the Clarification Act of 1943 "clarified" that wartime merchant seamen were covered by the SAA, and not by the Federal Employees' Compensation Act. The effect of these statutes is

that military personnel employed on public vessels of the United States are covered by the strict liability provision of the Federal Employees' Compensation Act, while civilian personnel employed on federally owned merchant vessels are covered by the SAA, which includes the doctrine of unseaworthiness. There is absolutely nothing in the texts or legislative histories of the 1916 Shipping Act, the 1920 SAA, or the 1943 Clarification Act suggesting that workers covered only by the SAA were to be left *totally remediless* from injuries resulting from the exercise of discretionary functions.[6] In particular, there is nothing in those texts or legislative histories suggesting that a discretionary function exception covering design decisions respecting a ship or its equipment would modify the traditional maritime doctrine of unseaworthiness.

The only support advanced by the United States for its misreading of the SAA is that absent a discretionary function exception, the SAA "runs afoul of the constitutional principles of separation of powers." Court of Appeals Brief for Appellee at 15. A statute imposing liability on the United States for a design decision resulting in unseaworthiness would, in other words, be unconstitutional! This extraordinary position is said to "derive[ ] from the inherent limitations on the exercise of judicial authority in our constitutional system of separation of powers between the branches of government." *Id.* at 16. Incredibly, the Court of Appeals, with no discussion of constitutional principles of separation of powers, and relying on equally unanalytical pronouncements by other courts of appeals,[7] accepted the government's position.

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6 The analysis of the Court of Appeals, importing a discretionary function exception into a strict liability doctrine like unseaworthiness, would apply as well to the United States' strict liability for maintenance and cure. *But see Warren v. United States*, 340 U.S. 523 (1951) (United States liable for maintenance and cure under SAA and Shipowners Liability Convention to same extent as private vessel owner).

7 Those circuit courts that went beyond the express terms of the statute and imported a discretionary function exception in the SAA, reached the conclusion with little, if any, analysis of separation of powers principles. The

Principles of separation of powers, as definitively announced by this Court, have no application to the proper construction of the SAA. The issue is simply the intention of Congress, and that intention could hardly be more clearly expressed.

This Court has analyzed the constitutionality of congressional legislation for consistency with separation of power principles in two circumstances. First, the Court has evaluated particular enactments for consistency with specific textual provisions of the Constitution which arguably vest authority in another branch of the federal government. *E.g.*, *Morrison v. Olson*, 487 U.S. 654, 675-76 (1988) (considering whether appointment of a special prosecutor by the judiciary violated Appointments Clause of Article II); *Bowsher v. Synar*, 478 U.S. 714, 722-27 (1986) (considering whether Appointments Clause was violated by conferring executive functions on official removable by Congress). The government does not contend, and the Court of Appeals did not suggest, that there is any textual support for its constitutional position.

Second, this Court has evaluated congressional enactments for consistency with a non-textual, functional doctrine of separation of powers. *See Mistretta v. United States*, 488 U.S. 361 (1989). The analysis of functional, as opposed to textual,

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First Circuit simply stated that "sound principles" demand such construction to preclude independent judicial review of basic policy-making decisions. *See Gercey v. United States*, 540 F.2d 536, 539 (1st Cir. 1976), *cert. denied*, 430 U.S. 954 (1977). Subsequent rulings by another court relied upon similar reasoning. *See Bearce v. United States*, 614 F.2d 556, 559 (7th Cir.), *cert. denied*, 449 U.S. 837 (1980) (quoting the reasoning of *Gercey*); *Estate of Callas v. United States*, 682 F.2d 613, 620 (7th Cir. 1982) (citing *Bearce* as dispositive of the issue). More recently, courts addressing the issue have pinpointed the doctrine of separation of powers as the substantive basis for the result reached. *See In re Joint E. & So. Dist. Asbestos Lit.*, 891 F.2d 31, 35 (2d Cir. 1989); *Wiggins v. United States*, 799 F.2d 962, 965 (5th Cir. 1986); *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1086 (D.C. Cir. 1980). In all of these cases, the courts suggest or imply that the SAA would be unconstitutional if no discretionary function exception were included. However, none of the opinions explain how the discretionary function exception acts as a guardian of separation of powers.

violations of the separation of powers doctrine does not "contemplate[ ] complete division of authority between the three branches" but rather adopts a "more pragmatic, flexible approach." *Nixon v. Administrator of General Services (AGS)*, 433 U.S. 425, 442-43 (1977). The Court's pragmatic approach considers whether, as a result of a particular action:

(1) one branch of government assumes a function more properly entrusted to another (the aggrandizement-of-power test) *see Morrison*, 487 U.S. at 677-80; *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833, 856 (1986); *I.N.S. v. Chadha*, 462 U.S. 919, 963 (1983) (Powell, J., concurring in judgment); *Nixon v. AGS*, 433 U.S. at 441-42; *United States v. Nixon*, 418 U.S. 683, 694-97 (1974);

(2) one branch assumes functions that impair the ability of another branch to perform its proper functions; and

(3) the imposition of functions on one branch impairs that branch's ability to perform its own functions (the impairment test), *see Morrison*, 487 U.S. at 685; *Chadha*, 462 U.S. at 963 (Powell, J., concurring in the judgment); *Nixon v. AGS*, 433 U.S. at 443. Recently this Court strongly reiterated the position that the functional separation of powers doctrine applies only if a statute produces encroachments or aggrandizement of one branch at the expense of another. *Mistretta v. United States*, 488 U.S. 361 (1989).

The SAA, read literally, as Congress intended, does not run afoul of either aspect of the functional separation of powers doctrine. It does impose liability for design defects which render vessels unseaworthy and thereby produce injury, but judicial enforcement of that liability in no way aggrandizes judicial power and in no way encroaches on any legitimate authority of another branch.

The United States does not contend that the SAA involves an unlawful delegation of legislative authority. In light of controlling precedent, such a contention would be frivolous. *See Mistretta*, 488 U.S. at 371-75 (rejecting unlawful delega-

tion challenge to Sentencing Reform Act of 1984). Nor does the government contend that requiring the judiciary to adjudicate claims against the United States involves the judiciary in activity properly relegated to another branch. In light of controlling precedent, such a contention would also be frivolous. *E.g.*, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (grant of admiralty jurisdiction authorizes Article III Courts to create judge-made rules of admiralty law); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (Congress can require Article III Courts to adjudicate claims the payment of which requires congressional appropriations); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (Congress can confer authority on Article III Courts to create federal common law). Since there is no unlawful delegation of legislative authority, and no unlawful imposition of non-judicial functions on the judiciary, the government's separation of powers argument thus narrows to the proposition that if the SAA permits recovery for unseaworthiness resulting from a design defect, the Act is an unconstitutional impairment of unreviewable discretion vested in the executive branch by the Constitution.

There is no such constitutional rule. The Constitution authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution" not only its legislative powers, but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U. S. Const. art. I, § 8, cl. 18 (Appendix p. 44a). Congress has frequently exercised this broad authority by authorizing the judicial branch to scrutinize the discretionary actions of executive branch officials. For example, the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* ("APA"), contains comprehensive provisions for judicial review of executive branch agency actions.[8] Any person suffering a legal wrong because of

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8 While the APA does not act as a waiver of the sovereign immunity of the United States for monetary damage claims, it does permit entry of equitable relief. By conferring on the courts the power to enter orders for

agency action or adversely affected by an agency action is entitled to judicial review of that action. *See* 5 U.S.C. § 702 (Appendix p. 44-45a).[9] The APA expressly allows the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (Appendix p. 45a). While a court may not simply substitute its own discretion for that of the agency, *see Consolo v. Federal Maritime Commission*, 383 U.S. 607, 621 (1966), it is well established that judicial review is appropriate if the agency's discretion has been abused. *See Department of Navy v. Federal Labor Relations Authority*, 815 F.2d 797 (1st Cir. 1987); *Moret v. Karn*, 746 F.2d 989 (3d Cir. 1984). The government's position in this case suggests that the Justice Department regards the APA as an unconstitutional interference with executive branch discretion.

If there is a separation of powers issue in this case, it is not the false issue relied upon by the Court of Appeals. The waiver of sovereign immunity of the United States in the SAA for maritime torts is limited only by the specific statutory exceptions in that Act. *See* 46 U.S.C. App. § 745 (Appendix pp. 47-48a). Absent from any of these limitations is any discretionary function exception. By implying such an exception into the SAA, and thus drastically contracting the

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declaratory and injunctive relief and for a writ of mandamus, Congress has permitted the judiciary to impose remedies which in many instances are more burdensome on the daily operations of government and more intrusive of the decision-making authority of those branches than any monetary damage remedy.

9 The APA provides an exception to this grant of judicial power to review agency discretion where such review is otherwise precluded by statute or where agency action is committed to agency discretion by law. *See* 5 U.S.C. § 701(a)(1) and (2) (Appendix p. 44a). The former exception applies only when Congress has expressed an intent to preclude judicial review. *See Heckler v. Chaney*, 470 U.S. 821, 830 (1985). The latter exception, agency action "committed to agency discretion," is a very narrow exception and is applicable when there is no meaningful standard against which to evaluate the agency's exercise of discretion. *See id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)).

scope of the unseaworthiness remedy, the Court of Appeals has assumed a legislative function, imposing limitations that were not provided by Congress. As a result, immunity is read into a statute designed to waive it. *See Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955). By doing so, the judiciary is not acknowledging the limits of its judicial powers, but rather is undertaking a function which is exclusively within the province of the legislature. By reading a discretionary function exception into the SAA, the Court of Appeals has violated the very doctrine it relied upon. Moreover, the Department of Justice has persuaded the Court of Appeals to engage in this violation by asserting that the executive branch has a discretion which even Congress may not subject to judicial review. That court has undertaken to shield executive branch functions from congressional control through the judicial process. That position is reminiscent of some extreme executive branch positions advanced, but uniformly rejected, in litigation arising out of Watergate and the Iran-Contra affairs. Its recurrence in this case, while not as dramatic, is equally improper. Congress, not the executive branch, has the authority to waive the sovereign immunity of the United States, and that authority is not limited by any doctrine of uninhibited executive branch discretion. Indeed, the Tucker Act, another waiver of sovereign immunity in place since 1887, and authorizing suits against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages not sounding in tort", contains no discretionary function exception. 28 U.S.C. § 1346(a)(2) (Appendix pp. 45-46a). The governmental activities encompassed within this waiver of sovereign immunity involve numerous exercises of executive branch discretion. No case of which we are aware has ever suggested that an executive branch discretionary function must be read into the Tucker Act.

The distinction between the Tucker Act and the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (Appendix p. 46a),

which has a discretionary function exception, 28 U.S.C. § 2680(a) (Appendix p. 46a), probably explains why Congress chose to include that exception in the latter. The Tucker Act involves claims predicated upon uniform federal law. Even contract disputes with the United States are decided under federal law. *See Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). In the Federal Tort Claims Act, however, Congress opted to refer to a non-uniform body of state tort law. *See* 28 U.S.C. § 1346(b) (liability in accordance with law of state where tort occurred). With such a reference, the reservation of discretionary functions which would otherwise be subjected to differing levels of scrutiny from one state to another, made sense. The SAA, like the Tucker Act, refers to a uniform body of federal law, and in neither did Congress find any need to shield executive branch discretionary activity from judicial review.[10]

We note, finally, that even in instances where no federal statute provided a remedy against the United States, this Court has nevertheless resorted to common law tort remedies to control the manner in which officials in other branches of the federal government carry out their functions. *See Butz v. Economou*, 438 U.S. 478 (1978) (executive branch officer exercising discretionary functions does not have absolute immunity); *Davis v. Passman*, 442 U.S. 228 (1979) (legislative branch member liable for sex discrimination in discretionary

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10 It must be noted that the decision of the Court of Appeals, implying a discretionary function exception into the SAA on the basis of constitutional principles, puts in doubt the constitutionality of proposed legislation designed to narrow the application of the specific exception of the Federal Tort Claims Act. Significantly, the Department of Justice's opposition to that legislation did not raise any constitutional concerns but instead focused its analysis on the effect increased government liability would have on the budget. *Statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, Department of Justice before the Subcommittee on Administrative Law and Governmental Relations, Committee of the Judiciary, House of Representatives concerning H.R. 1095 and H.R. 2536 (November 1, 1989)*. As this Court has observed, it is not the province of the judiciary to safeguard the Treasury by "import[ing] immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).

hiring decision); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) (executive branch officers exercising discretionary functions liable for constitutional torts). Even in instances where a Federal Tort Claims Act remedy is available, this Court has enforced a more expansive tort remedy against executive branch officers exercising discretionary functions. *See Carlson v. Green*, 446 U.S. 14 (1980). Clearly the Court's purpose was to control the manner in which these government agents discharged their largely discretionary functions, and clearly the Court's effort is constitutional.

The Court of Appeals has applied a non-existent constitutional rule of separation of powers to justify a misreading of the SAA, and this Court should put a stop to the growth of an aberrational doctrinal development.

POINT III

A WRIT OF CERTIORARI SHOULD ISSUE TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS ON A SIGNIFICANT QUESTION OF LAW

A primary function of the certiorari jurisdiction of this Court is to resolve conflicts among the Circuits. *Bailey v. Weinberger*, 419 U.S. 953 (1974) (White, J., dissenting); U.S. Sup. Ct. R. 10.1. Previously this Court has exercised its discretion and issued a writ of certiorari to resolve "an apparent conflict in approach," *Saxbe v. Washington Post Co.*, 417 U.S. 843, 846 (1974), and "an apparent conflict" between the Circuit Courts of Appeals. *Avco Corp. v. Aero Lodge 735*, 390 U.S. 557, 559 (1968). This Court has also issued the writ to review a maritime matter where decisions from several Courts of Appeals "seemed to suggest a result different from the one reached in the instant case." *Waldron v. Moore-McCormack Lines*, 386 U.S. 724, 724 n.2 (1967). Rather than the suggestion of a conflict, the decision below is in direct conflict with the decision of the Court of Appeals for the Fourth Circuit in *Lane v. United States*, 529 F.2d 175 (4th

Cir. 1975).[11] Most recently, this Court has granted certiorari to review the intent of Congress and the proper meaning to be given to terms under the general maritime law at the time of the passage of the Jones Act. *McDermott Int'l, Inc. v. Wilander*, 59 U.S.L.W. 4091 (U.S. 2/19/91) (No. 89-1474), *affirming*, 887 F.2d 88 (5th Cir. 1989).

This Court has previously articulated the constitutional requirement for uniformity in the application of maritime law. *Miles v. Apex Marine Corp.*, 112 L.Ed.2d 275, 287 (1990); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875). That uniformity is impossible where the Courts of Appeals are in basic disagreement whether the discretionary function exemption must be implied into the Suits in Admiralty Act.

In *Lane*, *supra*, the Court of Appeals for the Fourth Circuit squarely addressed the issue, holding that the discretionary function exception could not be implied into the SAA. *Lane*, 529 F.2d at 178-79.[12] The Fourth Circuit thereafter

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11 The decision below is in accord with the decisions of the Courts of Appeals for the First, Second, Fifth, Sixth, Seventh and Eleventh Circuits and the Court of Appeals for the District of Columbia. *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1085-87 (D.C. Cir. 1980); *Gercey v. United States*, 540 F.2d 536, 539 (1st Cir. 1976), *cert. denied*, 430 U.S. 954 (1977); *Brown v. United States*, 790 F.2d 199 (1st Cir. 1986), *cert. denied*, 479 U.S. 1058 (1987); *In re Joint E. & So. Dist. Asbestos Lit.*, 891 F.2d 31 (2d Cir. 1989); *Wiggins v. United States*, 799 F.2d 962, 964-66 (5th Cir. 1986); *Gordon v. Lykes Bros. S.S. Co., Inc.*, 835 F.2d 96 (5th Cir.), *cert. denied*, 488 U.S. 825 (1988); *Gemp v. United States*, 684 F.2d 404, 408 (6th Cir. 1982); *Chotin Transp. Co. v. United States*, 819 F.2d 1342, 1347 (6th Cir.) (en banc), *cert. denied*, 484 U.S. 953 (1987); *Estate of Callas v. United States*, 682 F.2d 613, 619 (7th Cir. 1982); *Bearce v. United States*, 614 F.2d 556, 559-60 (7th Cir.), *cert. denied*, 449 U.S. 837 (1980); *Williams v. United States*, 747 F.2d 700 (11th Cir. 1984), *adopting*, 581 F. Supp. 847 (S.D. Ga. 1983).

12 The decision in *Lane* echoes the analysis of Chief Judge Brown writing for the Court of Appeals for the Fifth Circuit in *DeBardeleben Marine Corp. v. United States*, 451 F.2d 140, 142-47 (5th Cir. 1971). *DeBardeleben*, which concluded that specific exemptions contained in the Federal Tort Claims Act were not to be implied into the SAA, was later rejected by the Fifth Circuit in *Wiggins v. United States*, 799 F.2d 962 (5th Cir. 1986), on

confirmed the continuing vitality of *Lane* in *Faust v. South Carolina State Highway Dep't*, 721 F.2d 934, 937 (4th Cir. 1983) *cert. denied*, 467 U.S. 1226 (1984).

By reading a discretionary function exception into the SAA, the court below has severely circumscribed the scope of the statute. The effect of that decision is to give the United States the ability to avoid liability for placing unseaworthy ships into commerce. That extraordinary exemption, however, is denied to a private shipowner. As discussed in Point I, *supra*, the decision below is in open conflict with the expressed purpose of Congress in enacting the statute, i.e., to waive sovereign immunity when the United States acts as a private shipowner, and to permit suits *in personam* against the United States for injuries sustained from the operation of its vessels. In *Lane*, the Fourth Circuit recognized that Congress intended, by the SAA, solely to exempt United States vessels from maritime arrest and not otherwise to disturb the waiver of immunity previously granted by the Shipping Act of 1916 as defined by this Court in *The Lake Monroe*. The decision below ignores both the clear language of the statute, its legislative history and the decisions in both *The Lake Monroe* and *Lane*.

Rather than confining its analysis to what Congress intended when the SAA was enacted, the Court of Appeals accepted the invitation of the government to re-write the statute on the basis of undefined constitutional principles. Under the guise of a separation of powers analysis, the court pursued a course which ultimately obscured its own "touchstone"—the purpose of Congress. 874 F.2d at 172 (Appendix p. 29a).

Resolution of the conflict with the Fourth Circuit is essential to the proper enforcement of rights granted by Congress in the SAA. Moreover, the conflicting decisions prevent the

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the ground that separation of powers principles required the implication of a discretionary function exception into the SAA.

uniform application of maritime law and present an issue which only this Court can resolve.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

Filed November 29, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5132

SEA-LAND SERVICE, INC.,

Appellant

vs.

U.S.A.

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 87-02483)

Argued August 21, 1990

BEFORE: STAPLETON, COWEN, and WEIS,
Circuit Judges

(Opinion Filed November 29, 1990)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

In 1979, David W. Swogger brought suit in a state court against five shipowners, including Sea-Land Service, Inc. ("Sea-Land"). Swogger sought recovery for asbestos-caused personal injuries incurred as a result of his service from 1949 to 1978 aboard vessels owned by the five shipowners. After Swogger died in 1980, the suit was converted to a wrongful death action. Sea-Land settled with Swogger's estate in 1985. Because Swogger had served from 1943 to 1948

on United States ships that were built with asbestos, Sea-Land in 1987 filed suit against the United States under the Suits in Admiralty Act ("SAA"), 46 U.S.C. §§ 741 *et seq.*, in the United States District Court for the District of New Jersey. The complaint sought contribution and/or indemnity for Sea-Land's settlement with Swogger's estate. The district court dismissed Sea-Land's claims, holding that they were barred by an implied discretionary function exception to the SAA's waiver of sovereign immunity.[1] We have jurisdiction pursuant to 28 U.S.C. § 1291, and our review is plenary. We will affirm the judgment of the district court.

I.

Sea-Land raises two questions in its appeal: whether the SAA contains a discretionary function exception to its waiver of sovereign immunity and, if so, whether the Government's use of asbestos in ships sailed during and after World War II falls within the exception.

A.

Although not contained in any explicit provision of the Constitution, the English legal doctrine that the sovereign is immune from any suit to which it has not consented has been applied by courts in this country as vigorously as it had been in England. *Feres v. United States*, 340 U.S. 135, 139 (1950). Thus, it is an "accepted jurisprudential principle that no action lies against the United States unless the legislature has authorized it."

1. The United States District Court originally dismissed the action as barred by the statute of limitations. We reversed and remanded for further proceedings. *Sea-Land Service, Inc. v. United States*, 874 F.2d 169 (3d Cir. 1989).

Dalehite v. United States, 346 U.S. 15, 30 (1953); *see also Library of Congress v. Shaw*, 478 U.S. 310 (1986) ("As sovereign, the United States, in the absence of its consent, is immune from suit.").

The Supreme Court has used strict standards to determine when Congress has consented to suit and thereby waived the sovereign immunity of the United States. The Court has stated that "a waiver of sovereign immunity cannot be lightly implied, but must be unequivocally expressed." *United States v. Mottaz*, 476 U.S. 834, 851 (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980)). Waivers of sovereign immunity are to be construed "strictly in favor of the sovereign." *Library of Congress*, 478 U.S. at 318.[2]

Thus, even when Congress has used somewhat open-ended language in a statute that waives the immunity of the United States, the Court has not construed the waiver as broadly as the language of the statute would permit. For example, in *Library of Congress*, 478 U.S. at 319-20, the Court, in determining that Title VII did not waive sovereign immunity for awards of interest, stated that "[o]ther statutes placing the United States in the same position as a private party also have been read narrowly to preserve certain immunities that the United States has enjoyed historically." In

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2. Similarly, Congress must clearly express its intent in order to abrogate a state's Eleventh Amendment sovereign immunity. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984) (Court must find "unequivocal expression of congressional intent" to conclude that Congress abrogated the States' immunity).

Laird v. Nelms, 406 U.S. 797 (1972), the Court held that although the Federal Tort Claims Act imposed liability on the United States for the "negligent or wrongful act or omission of any employee of the Government .... under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," the United States was nonetheless not liable for the entire range of conduct classified as tortious under state law.

Moreover, when the issue is whether Congress has waived sovereign immunity for the consequences of governmental policymaking, courts have recognized the sensitive nature of the issue and have declined to find a waiver absent unmistakable evidence of such an intent. As Professor Davis has observed "the process of governing almost always helps some and hurts others." 5 K. Davis, *Administrative Law Treatise* § 27.11 (1983). As a result, the imposition of liability for damages occasioned by governmental policymaking would necessarily involve a very substantial, if not prohibitive, social cost not only in terms of the imposed liability itself, but also in terms of the constraining effect of that liability on the decisions of governmental policymakers. In the absence of compelling evidence to the contrary, we will decline to assume that Congress intended to impose that social cost on the federal government.

Against this backdrop, we turn to the Federal Tort Claims Act ("FTCA") and the SAA. The FTCA, 28 U.S.C. § 1346(b), which Congress enacted in 1946, waives sovereign immunity in suits against the United States for injuries or losses caused by the negligent or wrongful act or omission of any employee of the government under circumstances

where a private person would be liable to the claimant. The Act contains an explicit exception, known as the discretionary function exception, which excludes any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

The SAA was enacted in 1920, over twenty-five years before the FTCA.[3] It provides that in "cases where if [a United States] vessel were privately owned or operated, ... a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States." 46 U.S.C. § 742. The United States operated merchant marine vessels during World War II under the auspices of the War Shipping Administration. Executive Order 9054, 3 C.F.R. 1086 (1938-43), *reprinted in* 1942 U.S.C.S. 154. Unlike the FTCA, the SAA does not contain an explicit discretionary function exception. That raises the first question in this appeal: Is there a discretionary function exception to the SAA notwithstanding the lack of an express provision to that effect?

Although the FTCA contains an explicit discretionary function exception to its waiver of sovereign immunity, the Supreme Court has indicated that the exception merely makes explicit what would otherwise be implicit:

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3. Congress amended the SAA in 1960 in order to clarify jurisdictional boundaries among the Suits in Admiralty Act, the Public Vessels Act, the Federal Tort Claims Act, and the Tucker Act. *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 172-73 (1976); *see also* S. Rep. No. 1894, 86th Cong., 2d Sess. (1960); *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1085-86 (D.C. Cir. 1980). Thus the 1960 amendments are not relevant to this case.

> It was believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction; nevertheless, the specific exception was added to make clear that the Act (FTCA) was not to be extended into the realm of the validity of legislation or discretionary administrative action.

United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 810 (1984).

We understand *Varig* to teach that, as a matter of judicial construction, we should not read a general waiver of sovereign immunity to include a waiver of immunity with respect to damage occasioned by policy decisions. Accordingly, we hold that the SAA, which explicitly contains only a general waiver, also implicitly contains a discretionary function exception to its waiver of sovereign immunity.

With one exception, every court of appeals that has considered the question has agreed with our conclusion. *In re Joint Eastern and Southern Districts Asbestos Litigation*, 891 F.2d 31 (2d Cir. 1989); *Wiggins v. United States*, 799 F.2d 962 (5th Cir. 1986); *Bearce v. United States*, 614 F.2d 556 (7th Cir.), *cert. denied*, 449 U.S. 837 (1980); *Canadian Transport Co. v. United States*, 663 F.2d 1081 (D.C. Cir. 1980); *Gercey v. United States*, 540 F.2d 536 (1st Cir. 1976), *cert. denied*, 430 U.S. 954 (1977). The lone court of appeals case coming to the opposite conclusion is *Lane v. United States*, 529 F.2d 175, 179 (4th Cir. 1975).

In *Lane*, 529 F.2d at 179, the court concluded that there was "no basis upon which we can import the many exceptions in the Tort Claims Act

into the Suits in Admiralty Act, where the United States is to be held accountable in admiralty whenever a private person, in similar circumstances, would be." We disagree with both the Fourth Circuit's conclusion and its characterization of the conclusion we here reach. We are not importing an exception from one act to another; instead, we are acknowledging that Congress must speak with unmistakable intent in order to waive tort immunity for the government's discretionary functions. Accordingly, we agree with the courts of appeals other than that for the Fourth Circuit in holding that the SAA contains an implied discretionary function exception to its waiver of sovereign immunity.

B.

Sea-Land claims that even if the SAA contains a discretionary function exception to its waiver of sovereign immunity, the conduct of the United States in this case does not fall within the exception. It makes four arguments to support this claim. We will consider these in turn.

First, Sea-Land argues that the use of asbestos in ships was not the result of any affirmative decision. In deciding whether the discretionary function exception applies in a particular case, the Supreme Court stated in *Berkovitz v. United States*, 486 U.S. 531 (1988), that a court must at the outset consider whether the action is a matter of choice for the acting employee. The discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. Then, a court must determine whether the judgment involved in the challenged conduct is of the kind that the discretionary function exception was

designed to shield. The exception protects only governmental actions and decisions based on considerations of public policy. Where there is room for policy judgment and decision, there is discretion. In summary, the Court stated that "the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment." *Berkovitz*, 486 U.S. at 537.

In determining whether the action of the government involves the permissible exercise of policy judgment, we need not examine the record for evidence of a conscious policy decision regarding the use of asbestos in ship construction. The relevant inquiry is whether the use of asbestos is a matter "susceptible to policy analysis." *United States Fidelity & Guaranty Co. v. United States*, 837 F.2d 116, 121 (3d Cir.), *cert. denied*, 487 U.S. 1235 (1988). An oversight or a failure to weigh the relevant factors does not affect whether we treat the conduct as a matter susceptible to policy analysis. As the Sixth Circuit pointed out in *Myslakowski v. United States*, 806 F.2d 94, 97-98 (6th Cir. 1986), *cert. denied*, 480 U.S. 948 (1987), if the negligent failure of a government policymaker to consider all relevant aspects of a matter was not within the exception, the discretionary function exception would be illusory.

In this case, the government's use of asbestos in ships built during its rapid World War II ship construction program was a matter susceptible to policy analysis. In the prosecution of World War II, the War Shipping Administrator determined that "[t]he utmost use [must be] squeezed out of each vessel" and that "[e]very attempt [would be] made to plan and organize the use of the fleet at maximum efficiency." Report of the War Shipping

Administrator to the President, *The United States Merchant Marine at War* 41 (Jan. 15, 1946). The Administrator was delegated authority to operate and use the vessels "in order to assure the most effective utilization of the shipping of the United States for the successful prosecution of the war." Executive Order 9054, 3 C.F.R. 1086 (1938-43), *reprinted in* 1942 U.S.C.S. 154.

In pursuing that goal, the choice of materials was one of a number of factors to consider in order to produce in a short time ships that would do the best job at the least cost. As the Second Circuit stated, "During the war, the government was faced with a desperate need to place merchant ships upon the seas. The decisions to operate existing ships, which contained asbestos, and to employ existing designs and materials, including asbestos, in the construction of new ships were not prescribed by any federal statute, regulation, or policy, save for the ultimate policy of saving the nation." *Asbestos Litigation*, 891 F.2d at 37; *see also Gordon*, 835 F.2d at 100 ("the government has provided a substantial amount of historical evidence showing that the use of asbestos was consistent both with the policy of building the ships rapidly and the existing standard design. In both cases officials chose from among important alternative courses of action."). We agree that the use of asbestos in ships, whether traceable to a conscious decision or not, was a policy judgment that is within the discretionary function exception.

Sea-Land's second argument is that even if the operation of ships with asbestos during wartime was a policy judgment subject to the discretionary function exception, the operation of ships after the war is not within the exception. We disagree. The use after the war of ships that contained asbestos,

like the use of such ships during the war, presented a significant question of resource allocation and was a "matter susceptible to policy analysis." Again, we need not find evidence of a conscious policy decision.

Sea-Land's third argument concerns the government's failure to warn of the dangers of asbestos. This argument confuses negligence with immunity; the government may be negligent but nevertheless immune from tort liability. The government's failure, both during and after the war, to warn of the potential health risks of asbestos once it learned of them was a matter susceptible to policy analysis and within the discretionary function exception. As the Fifth Circuit stated, this was a choice "similar" to the choice to use asbestos in the first instance. *Gordon*, 835 F.2d at 100; *see also Shuman v. United States*, 765 F.2d 283, 290 (1st Cir. 1985) ("Lack of due care in promulgating a policy for [asbestos safety], or in having no policy or program at all upon [such] an issue, is encompassed within the discretionary function exception.").

Finally, Sea-Land argues that the warranty of seaworthiness, a maritime common law duty, imposed a mandatory duty on government officials to provide seaworthy ships. This argument misperceives the discretionary function exception. Once we have determined that an act was an exercise of policy judgment within the discretionary function exception, our inquiry is at an end. If the conduct is the product of policy decisionmaking, it makes no difference what standard of care is imposed by the law regulating private conduct. The warranty of seaworthiness is thus irrelevant to our decision in this case.

II.

We hold that the Suits in Admiralty Act contains an implied discretionary function exception to its waiver of sovereign immunity and that the Government's conduct in this case falls within that implied discretionary function exception. Therefore, we will affirm the district court's judgment in favor of the United States.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 87-2483

SEA-LAND SERVICE, INC.

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

OPINION

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WOLIN, District Judge

Before the Court is the motion of defendant United States to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) on the ground that this Court lacks subject matter jurisdiction over the action. The Court has carefully reviewed the submissions of the parties and heard the arguments of counsel. For the following reasons, defendant's motion will be granted and this action will be dismissed.

I. *BACKGROUND*

This is the second motion that defendant has brought seeking the dismissal of the action for lack of subject matter jurisdiction. A complete background of this action can be found in this Court's prior opinion.[1] By way of summary, this action arises from a wrongful death action brought in the New York State Supreme Court for New York County. That action, commenced in 1979, was originally brought by David

1 On July 11, 1988, this Court granted the United States' motion to dismiss the complaint as barred by the statute of limitations. *Sea-Land Service, Inc. v. United States*, 689 F. Supp. 450 (D.N.J. 1988). The Third Circuit reversed that decision on May 9, 1989, *Sea-Land Service, Inc. v. United States*, 874 F.2d 169 (3d Cir. 1989), and remanded the case to this Court for further proceedings.

Swogger as a seaman's action for personal injury pursuant to the Jones Act, 46 U.S.C. § 688, and general maritime law. The complaint alleged that while working as a marine engineer aboard thirteen vessels owned by five shipowner defendants (one of whom was Sea-Land Service, Inc.), David Swogger was exposed to asbestos-containing products which caused him to contract a lung disease. Upon his death, allegedly of malignant mesothelioma, the Executrix of his estate was substituted as plaintiff and a cause of action for wrongful death was added to the complaint.

In 1984, Sea-Land (a defendant in the New York State action) filed a third-party complaint in New York State naming 52 third-party defendants, including asbestos manufacturers, shipyards, distributors and additional shipping companies. Included within this group of third-party defendants were four shipowner-employers who, although not named as primary defendants in the *Swogger* action, operated ships for the United States during 1943-1948 pursuant to General Agency Agreements.[2] Pursuant to contractual relations and/or the Suits in Admiralty Act, 46 U.S.C. App. §§ 741-752 ("SIAA"), these four defendants, because they operated as agents of the United States, tendered their defenses to the United States. At that point Sea-Land agreed to their voluntary dismissal from the New York State action.

On June 24, 1985, Sea-Land reached a settlement in that action. Two years later, Sea-Land filed the instant suit against the United States pursuant to the provisions of the Public Vessels Act, 46 U.S.C. § 782, *et seq.*, and general admiralty law. In this action, Sea-Land seeks indemnity or contribution from the United States for the sums it paid in settlement of the New York State action due to Swogger's alleged exposure to asbestos while employed aboard the vessels owned or operated by the United States.

In their first motion to dismiss this action for lack of subject matter jurisdiction, the United States contended that the statute of limitations had run on the contribution and indem-

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2 These companies were: Exxon Co. U.S.A. (Standard Oil of New Jersey), Marine Transport Lines, Inc., Moore-McCormack Lines and United States Lines Co.

nity claims of Sea-Land. In the instant motion, the United States advances the argument that this case must be dismissed because the actions of the United States which allegedly caused the injury of David Swogger were discretionary acts not subject to the general waiver of sovereign immunity found in the SIAA.[3] Sea-Land opposes the motion contending that the plain language and legislative history of both the SIAA and the War Shipping Administration Clarification Act of 1943 ("CA"), 50 U.S.C. App. § 1291, mandate a finding by this Court that no statutory exception exists for discretionary functions. In the alternative, plaintiff argues that if this Court implies such an exception into the SIAA and the CA, then defendant's conduct is not protected by the exception.

II. *DISCUSSION*

A. *The Discretionary Function Exception*

The Court must first decide whether the discretionary function exception will be imported into the SIAA and the CA either as a matter of statutory construction, or constitutional interpretation. Although, the Third Circuit has yet to squarely address this precise issue,[4] all of the Circuit Courts who have raised the issue have decided to imply the exception into the SIAA and the CA.[5] Sea-Land does not dispute that the weight of authority supports the implication of the excep-

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3 Although the issue of subject matter jurisdiction may be examined at any time, the efficient use of judicial resources must be placed above the strategic litigation tactics of the defendant. The efficient use of judicial resources would have been better served by the United States bringing all of its attacks on the subject matter of this Court at the same time, thereby avoiding a piece-meal determination of the matter by the trial and appellate courts.

4 The Third Circuit has noted the issue, but refused to address it in *Patentas v. United States*, 687 F.2d 707, 714 n. 7 (3d Cir. 1982) and *Andrews v. United States*, 801 F.2d 644, 651 n. 7 (3d Cir. 1986).

5 Because all claims under the CA must be enforced pursuant to the SIAA any exception applicable to the latter will also encompass the former. *See Robinson v. United States*, No. 89-6109, 1989 U.S. App. LEXIS 18175, *13 (2d Cir. Nov. 29, 1989); *Gordon v. Lykes Bros. Steamship Co.*, 835 F.2d 96, 99 (5th Cir.), *cert. denied*, 109 S. Ct. 73 (1988).

tion into the two acts, but asks this Court to find that the statutory language, history and purpose of each act requires this Court to refuse to imply the exception.

The Suits in Admiralty Act waives the government's sovereign immunity for all maritime torts alleged against the United States. Section 742 states in relevant part:

> In cases where if [a United States] vessel were privately owned or operated, . . . a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States. . . .

46 U.S.C. App. § 742. The CA was passed to clarify the status of merchant seaman sailing on vessels owned and operated by the United States through the WSA. The relevant portion of that act states:

> [Seaman] employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to . . . death, injuries, illness, . . . have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels.

50 U.S.C. App. § 1291(a). Under the CA, these seamen also lost the right to sue private vessel owners acting as agents of the United States and lost any rights to compensation under other federal employee compensation schemes. The CA states that any claim for death, injury, and illness under the act must be "enforced pursuant to the provisions of the Suits in Admiralty Act." *Id.*

The discretionary function exception, as such, is taken from the statutory exception written into the Federal Tort Claims Act ("FTCA"). The FTCA does not apply to "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be

abused." 28 U.S.C. § 2680(a). This exception states that the government will not waive its sovereign immunity for claims resulting from the performance of a "discretionary function" or governmental policy decision. As the Fifth Circuit has stated, "[t]he discretionary function exception, at its root, stands for the proposition that 'it is not a tort for government to govern' " *Gordon v. Lykes Bros. Steamship Co.*, 835 F.2d 96, 98 (5th Cir.), *cert. denied*, 109 S. Ct. 73 (1988) *quoting Dalehite v. United States*, 346 U.S. 15, 57, 73 S. Ct. 956, 979 (1953) (Jackson, J., dissenting). The Supreme Court of the United States has described the exception in the FTCA as "mark[ing] the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808, 104 S. Ct. 2755, 2762 (1984). Neither the SIAA, nor the CA, expressly contain this exception.

Although the Third Circuit has not yet decided this question, with only one exception, all of the Circuit Courts that have faced the issue have held that the discretionary function exception of the FTCA must be implied into the SIAA and the CA. *See Brown v. United States*, 790 F.2d 199, 202-03 (1st Cir. 1986), *cert. denied*, 479 U.S. 1058 (1987); *Robinson v. United States*, No. 89-6109, 1989 U.S. App. LEXIS 18175, *13 (2d Cir. Nov. 29, 1989); *Gordon*, 835 F.2d at 98-99; *Wiggins v. United States*, 799 F.2d 962, 966 (5th Cir. 1986) ("a discretionary functions limitation is implicit in private suits brought against the United States Government under the Suits in Admiralty Act."); *Chotin Transp. Co. v. United States*, 819 F.2d 1342, 1347 (6th Cir.), *cert. denied*, 108 S. Ct. 344 (1987); *Gemp v. United States*, 684 F.2d 404, 408 (6th Cir. 1982); *Estate of Callas v. United States*, 682 F.2d 613, 619 (7th Cir. 1982); *Williams v. United States*, 747 F.2d 700 (11th Cir. 1984); *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1085-87 (D.C. Cir. 1980).

These Courts have based their decision in part on the premise that the discretionary functions exception implicates the constitutional doctrine of separation of powers. "We

believe that respect for the doctrine of separation of powers requires that in cases arising under the Suits in Admiralty Act, courts should refrain from passing judgment on the appropriateness of actions of the executive branch which meet the requirements of the discretionary function exception of the FTCA." *Canadian Transport*, 663 F.2d at 1085. The Court went on to add that "[o]ur recognition of a discretionary function exception in the Suits in Admiralty Act, therefore, is not an attempt to rewrite the statute, but merely an acknowledgment of the limits of judicial power." *Id.* at 1086. *See Varig Airlines*, 467 U.S. at 810, 104 S. Ct. at 2762-63 (The legislative history of the exception states that "[i]t was believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction."); *Wiggins*, 799 F.2d at 965 (The discretionary function exception is based on a "combination of the doctrines of sovereign immunity and separation of powers.")

The Fourth Circuit appears to have once declined to imply the exception into the SIAA. *Lane v. United States*, 529 F.2d 175 (4th Cir. 1975). However, the validity of the holding of that case has been eroded by subsequent decisions of the Fourth Circuit. In *Magno v. Corros*, 630 F.2d 224 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981) the Court distinguished *Lane* and held that the United States owed no duty to the plaintiff. In *Faust v. South Carolina Highway Department*, 721 F.2d 934 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984), the Court noted the *Lane* and *Magno* holdings, but cited to several cases, including *Gercey* and *Gemp*, for the proposition that the exercise of administrative discretion is not reviewable by the judiciary in holding that the United States was not liable.

This Court is persuaded by the analyses conducted by the First, Fifth, Sixth, Seventh, Eleventh and District of Columbia Circuits which have held that the discretionary function exception must be implied into the SIAA and the CA. The Court finds that the exception implicates constitutional considerations of the separation of powers doctrine and is fully consistent with the general rule that waivers of sovereign

immunity be strictly construed. *See United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 1351 (1980). Therefore, the Court holds that the discretionary function exception applies to tort actions brought under the SIAA and the CA.

B. *The Application of the Exception*

Having determined that the discretionary function exception will be implied into the SIAA and the CA, the Court finds that the conduct of the defendant for which plaintiff seeks compensation falls within that exception. In *Varig Airlines*, the Supreme Court noted that "the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a government employee . . . are of the nature and quality that Congress intended to shield from tort liability." 467 U.S. at 813, 104 S. Ct. at 2764. Furthermore, the Supreme Court found that "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 814, 104 S. Ct. at 2765.

Varig Airlines reaffirmed the seminal case of *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956 (1953) in which the Supreme Court held that the discretionary function exception:

> includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion (footnote omitted).

Id. at 35-36, 73 S. Ct. at 967-68. In the recent case of *Berkovitz v. United States*, 108 S. Ct. 1954 (1988), the Supreme Court reaffirmed both *Dalehite* and *Varig Airlines* and then clarified the standard by stating that the exception "will not apply when a federal statute, regulation or policy specifically prescribes a course of action for the employee to follow." *Id.* at 1959.

Plaintiff contends that the exception is inapplicable because the United States has failed to meet its burden of showing that actual policy decisions were made concerning the construction and operation of government-owned vessels containing asbestos, the failure to warn of health risks related to asbestos exposure, or the continued use of the vessels after obtaining knowledge of potential health hazards.

The United States has provided this Court with a substantial amount of historical evidence[6] showing that the use of asbestos in the construction of vessels under the authority of the War Shipping Administration was consistent with the twin policy goals of rapidly building ships conforming to an existing standardized design. In *United States Fidelity & Guaranty Co. v. United States*, 837 F.2d 116, 121 (3d Cir.), *cert. denied*, 108 S. Ct. 2902 (1988), the Third Circuit held that "the relevant question is not whether an explicit balancing of [policy factors] is proved, but whether the decision is susceptible to policy analysis." *Accord*, *Smith v. Johns-Manville Corp.*, 795 F.2d 301, 308-09 (3d Cir. 1986) ("[t]he test is . . . whether the conduct was of the type associated with the exercise of official discretion.") In the instant case, the Court finds that the nature and character of the decision of the government to undertake a rapid, uniform ship construction program in the exigency of World War II is clearly one of policy.

In an almost identical factual situation, the Fifth Circuit held in the *Gordon* case that the decisions of the government to construct and operate its merchant marine fleet during World War II were policy decisions protected by the discretionary function exception. *Gordon*, 835 F.2d at 100. Also, the Fifth Circuit held that "the decision not to establish a safety program for seamen working with asbestos was a similar choice." *Id.* In the case of *Shuman v. United States*, 765 F.2d 283 (1st Cir. 1985), the First Circuit held that the government's failure to establish a safety program related to the risk of asbestos was a discretionary decision protected by the

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6 *See* Defendant's Memorandum in Support, Exhibits A to D; Plaintiff's Memorandum in Opposition, Exhibits C and D.

discretionary function exception to the FTCA. The Court stated that the "[l]ack of due care in promulgating a policy, or in having no policy or program at all on an issue, however imprudent it might seem, is encompassed within the discretionary function exception." *Id.* at 290.

Accordingly, this Court finds that the decision to construct and operate a merchant marine fleet on an expedited and uniform basis was based on policy and discretion. This decision, unfortunately meant that asbestos would be used in the construction of the ships. The United States is not liable for the non-negligent consequences of its discretionary acts. *cite* Therefore, the decision by the United States to use asbestos in the construction of the ships sailed on by David Swogger is protected by the discretionary function exception from attack in a tort action. Similarly, the decisions, or lack of decisions, of the government to; (1) fail to implement a program which warned of the possible health risks of asbestos exposure once it had allegedly learned of them; and (2) continue to use, or allow to be used, the vessels constructed with asbestos are also discretionary decisions protected from reexamination by the discretionary function exception. *See In re Agent Orange Product Liability Litigation*, 818 F.2d 194 (2d Cir. 1987); *Shuman v. United States*, supra.; *Ford v. American Motors Corp.*, 770 F.2d 465 (5th Cir. 1985).

III. *CONCLUSION*

For all of the above reasons, defendant's motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction is granted and plaintiff's complaint will be dismissed.

An order is attached herewith.

Dated: December 20, 1989

/s/ ALFRED M. WOLIN

ALFRED M. WOLIN, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
195 BROADWAY NEW YORK
ENTERED

NO. 88-5703

SEA-LAND SERVICE, INC.,

Appellant

vs.

UNITED STATES OF AMERICA

On Appeal From the United States District Court
For the District of New Jersey (Newark)
(D.C. Civil Action No. 87-2483)

Argued March 1, 1989

BEFORE: HIGGINBOTHAM, STAPLETON,
and COWEN, *Circuit Judges*

(Opinion Filed May 9, 1989)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

I.

This is an appeal from an order of the district court granting the motion of the United States to dismiss Sea-Land Service, Inc.'s ("Sea-Land") complaint seeking contribution from the United States under, *inter alia*, the Suits In Admiralty Act ("SIAA"). The district court held that Sea-Land's "contribution

action is time-barred by the two year statute of limitations of 46 U.S.C. § 745." We will reverse and remand.

II.

Sea-Land here seeks contribution toward amounts it paid to settle a wrongful death action brought in the New York State Supreme Court for New York County, entitled *Anna Claire Swogger, as Executrix of the Estate of David D. Swogger v. Waterman Steamship Corp., et al.* (the "Swogger action"). The Swogger action was commenced by David Swogger, a seaman, on April 13, 1979 to recover damages for personal injury pursuant to the Jones Act, 46 U.S.C. § 688, and general maritime law. The complaint alleged that while working as a maritime engineer aboard thirteen vessels owned by Sea-Land and the other four ship-owner defendants, Swogger was exposed to asbestos-containing products that caused him to contract a lung disease. Swogger was employed on these vessels from 1949 to 1978.

Swogger died on January 10, 1980, before any discovery had been conducted, and the suit remained dormant for approximately two years. On June 15, 1982, Anna Claire, David Swogger's widow, was named executrix of her husband's estate, and she caused the complaint to be amended to state a claim for wrongful death. Discovery commenced shortly thereafter and Sea-Land then found out that the complaint omitted reference to his first seven years at sea, 1941-1948, and to his employers during that period. In February, 1984, after having completed discovery, Sea-Land filed a third-party complaint against fifty-two parties. Included in this number were four shipping companies that had operated, pursuant to General Agency Agreements with the United States, the ships upon which David Swogger had worked until 1949. Based on

their contractual relationship with the United States, all four companies tendered their defense to the United States. The United States accepted the tenders and the court later entered an order dismissing the shipping companies from the state court action.

On June 24, 1985, Sea-Land settled with Mrs. Swogger for $385,208.28. On June 24, 1987, Sea-Land filed this suit in the district court against the United States seeking contribution or indemnity for its settlement with Swogger. The United States thereafter filed a motion to dismiss the complaint claiming that the district court lacked subject matter jurisdiction.

In granting the government's motion to dismiss, the district court held that it lacked subject matter jurisdiction because the action was time-barred under 46 U.S.C. § 745 (1982). The district court reasoned that *United New York, Sandy Hook Pilot's Ass'n v. United States*, 355 F.2d 189 (2d Cir. 1965) (Friendly, J.) supported the government's position that a cause of action for contribution against the government in an admiralty case, for the purposes of section 5 of the SIAA, 46 U.S.C. § 745, arose at the time of the underlying injury. Although taking note of contrary authority, the court stated that "the law of admiralty appears to be distinct to itself; and it is not within the province of this court to amend that which has withstood the test of time." Thus, the court concluded that the statute started to run, at the latest, upon the date of David Swogger's death, January 10, 1980.

III.

Sea-Land's action for contribution against the United States is governed by the two-year statute of limitations contained in the SIAA. The relevant provision states that "[s]uits authorized by this chapter may be brought only within two years after the cause of action arises. . . ." 46 U.S.C. § 745. Accordingly, we

must decide at what point a cause of action for contribution from the government arises under the SIAA.

We start our analysis with the general rule that a cause of action for contribution does not arise until the party seeking contribution has paid, or had a judgment rendered against him or her for, more than his or her fair share of a common liability. *ITT Rayonier, Inc. v. Southeastern Maritime Co.*, 620 F.2d 512, 514 (5th Cir. 1980) (per curiam); *Roehrig v. City of Louisville*, 454 S.W.2d 703, 705 (Ky. 1970); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Torts* § 50 at 339-340 (5th ed. 1984); 3 J. Moore, J. Lucas, and G. Grotheer, Moore's Federal Practice ¶ 14.09 at 14-55 to 14-56 (2d ed. 1988). Cases applying the general rule are legion. *See, e.g., Erie R.R. Co. v. Erie Transportation Co.*, 204 U.S. 220 (1907) (admiralty law); *Joiner v. Diamond M. Drilling Co.*, 688 F.2d 256 (5th Cir. 1982) (applying Louisiana law); *United States Lines, Inc. v. United States*, 470 F.2d 487 (5th Cir. 1972) (action against United States under the FTCA for negligent treatment of seaman); *General Electric Co. v. United States*, 620 F. Supp. 160 (D.C. Minn. 1985), *aff'd*, 792 F.2d 107 (8th Cir. 1986) (under the FTCA); *Bradford v. Indiana & Michigan Electric Co.*, 588 F. Supp. 708 (S.D.W.Va. 1984) (admiralty law); *Feehan v. United States Lines, Inc.*, 522 F. Supp. 811 (S.D.N.Y. 1980) (admiralty law); *Globig v. Greene & Gust Co.*, 184 F. Supp. 530 (E.D. Wis. 1960) (contribution against the United States under the FTCA); *Chicago & N.W.R. Co. v. Chicago, R.I. & P.R. Co.*, 179 F. Supp. 33 (N.D. Iowa 1959), *aff'd*, 280 F.2d 110 (8th Cir. 1960), *cert. denied*, 364 U.S. 931 (1961) (applying Iowa law); *New York & Porto Rico S.S. Co. v. Lee's Lighters, Inc.*, 48 F.2d 372 (E.D.N.Y. 1930) (in an admiralty case, following the example of Pennsylvania law); *Trinity Universal Ins.*

Co. v. State Farm Mutual Auto Ins. Co., 246 Ark. 1021, 441 S.W.2d 95 (1969); *Read Drug & Chemical Co. v. Colwill Constr. Co.*, 250 Md. 406, 243 A.2d 548 (1968); *Sziber v. Stout*, 419 Mich. 514, 358 N.W.2d 330 (1984); *McKay v. Citizens Rapid Transit Co.*, 190 Va. 851, 59 S.E.2d 121 (1950); *State Farm Mut. Auto Ins. Co. v. Schara*, 56 Wis.2d 262, 201 N.W.2d 758 (1972).[1]

Moreover, as the government conceded at oral argument, this general rule is applied in admiralty as well as in other cases. A cause of action for contribution between private parties in admiralty cases accrues either when one party pays, or has a judgment entered against it, for more than its share of the damages. *See Erie R.R. Co. v. Erie Transportation Co.*, 204 U.S. 220, 226-227 (1907) (stating that a right to contribution in an admiralty collision case accrues when the third-party plaintiff pays the original plaintiff). This court thus observed in *Purnell v. Norned Shipping B.V.*, 801 F.2d 152, 156 (3d Cir. 1986), *cert. denied*, 480 U.S. 934 (1987), a noncollision admiralty case, that "if the plaintiffs had a wrongful death claim against the City immediately

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1. We also note that it is the general rule that "the fact that the statute of limitations has run against the original plaintiff's action does not bar a claim for contribution, since that cause of action does not arise until payment." (footnotes omitted) *Prosser and Keaton on Torts* § 50 at 340; *Keleket X-Ray Corp. v. United States*, 275 F.2d 167, 169 (D.C. Cir. 1960) (In a FTCA case, the court stated that "[n]either releasing one tort-feasor.... nor allowing the statute of limitations to run in favor of one tort-feasor [the government], as in this case, should be permitted to [bar the second tort-feasor's claim for contribution against the first tort-feasor.]"). We see no reason to adopt a different rule for admiralty cases, *see Purnell v. Norned Shipping B.V.*, 801 F.2d 152, 154-156 (3d Cir. 1986), even ones against the government. *See Central River Towing v. City of Beardstown*, 750 F.2d 565, 571-572 (7th Cir. 1984) (rejecting the government's argument that, as any direct suit against it was time-barred under the SIAA, it could not be liable in contribution to a joint tortfeasor).

following the decedents' deaths. . . . the Stevedore, at that point, had an *inchoate* claim for contribution against the City under federal maritime law which would mature when it paid more than its share of the joint liability." (emphasis in original). Similarly, in the context of a collision case, we had occasion to address the issue of when a claim for contribution matures in *Stahl v. Ohio River Company*, 424 F.2d 52, 56 (3d Cir. 1970) (analyzing when a claim for contribution is mature under F.R.C.P. 13 and 14, the court observed that a counter-claimant seeking contributions "could not show he was entitled to relief until there was a final adjudication of his liability . . .").

These cases reflect the admiralty law as articulated by other courts. *See Petition of Bloomfield Steamship Co.*, 422 F.2d 728, 734 (2d Cir. 1970) (In a collision case between private parties, "[t]he right to contribution from the joint tort-feasor can be appropriately asserted only where the other tort-feasor has paid more than half of a third party's damages."); *ITT Rayonier*, 620 F.2d 512 (In a noncollision case, the court stated that "the general rule that any limitations period in a cause of action for indemnity or contribution does not begin to run until judgment against the defendant has been entered or payment of the primary liability payment has been made should be followed."). *Bradford*, 588 F. Supp. at 709.

Sustaining the government's position in this case would thus require us to hold that the rule in cases seeking contribution from the government under the SIAA is different from the rule universally applied in suits seeking contribution from private parties. We decline to do so.

Our touchstone, of course, must be Congress' intent in passing the SIAA, and we conclude that Congress would have us side with Sea-Land in this context. First, the best evidence of Congress' intent

with respect to the relevant issue is found in the text of the statute itself. Section 742 of the Act provides that "[i]n cases where if such a vessel were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States. . . ." 46 U.S.C. § 742 (1982). In addition, Section 743 mandates that "[s]uch suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." 46 U.S.C. § 743 (1982). In *Pantentas v. United States*, 687 F.2d 707 (3d Cir. 1982), we recognized the effect of these provisions, stating that "the SIAA makes the government liable under the same circumstances in which a private party would be liable." 687 F.2d at 715. While the *Pantentas* case dealt with the issue of whether detrimental reliance was an essential element of governmental liability, the governing principle of that case is also applicable here. As we have demonstrated, assuming the facts stated in the complaint to be true, a private party in the government's position would be liable to Sea-Land and we believe Congress intended the government to be as well.

Second, where, as here, Congress adopts a statute of limitations against a background of a body of consistently applied limitations and contributions law,[2] we believe that a court should not infer a

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2. The Suits in Admiralty Act was enacted in March 1920 against the backdrop of *Erie R.R. Co. v. Erie Transportation Co.*, 204 U.S. 220, 226-227 (1907); *In re Eastern Dredging Co.*, 182 F. 179, 183 (D.C. Mass. 1909) (In a collision case, the court stated that "[t]he payment of those claims will give it a right to recover one-half of what it so pays, in admiralty, as an incident of the joint liability against the owner of the scow."); and *The 'Juanita'*, 93 U.S. 337, 340 (1876), which had already established that a right to contribution in applicable admiralty cases accrued upon payment of the underlying claim.

congressional intent to depart from precedent in the absence of some clear indication that it made a decision to do so. Here, the government has referred us to no legislative history suggesting in any way that Congress rejected the general rule that a claim for contribution does not accrue at the time of the injury to the third party.

Third, the government has suggested no policy reason why Congress, having accepted the overarching principle of placing the government in parity with private shipowners, might have been motivated to fashion a special rule for contribution or limitations purposes that would place the government in a different position than private operators. While the government stresses that the general rule can result in a very extended exposure for it, that exposure is no greater than that of other shipowners.[3]

Finally, we note that virtually all of the helpful case law favors Sea-Land's position. The Court of Appeals for the Seventh Circuit addressed the issue before us in *Central Rivers Towing v. City of Bethlehem*, 750 F.2d 565 (7th Cir. 1984). It held that the claim for contribution did not arise until judgment had been entered against the plaintiff. *Id.* at 572.

We find *Central Rivers* to be the only court of appeals decision directly on point. Unlike the district court and the government, we do not find help on the issue before us in *Sandy Hook Pilot's Assn.*, 355 F.2d 189. The essence of the court's decision in *Sandy Hook*

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3. We are cognizant of the government's position that waivers of sovereign immunity must be construed strictly. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980). While we do not dispute this proposition, we do not find it helpful here. *See Cohen v. United States*, 195 F.2d 1019, 1021 (2d Cir. 1952) (Interpreting 46 U.S.C. § 745, the court stated that "[w]hile it is well settled that statutes permitting the government to be sued are to be construed strictly, the overriding consideration is that the intent of Congress, where that can be determined, must be given effect." (citations omitted)).

was the affirmance of the district court's determination that it was bound by the principles of *res judicata* when granting a motion to dismiss a pleading that was identical to one that had been filed three years before and that had been found to be time-barred. The court noted that the original decision had not been appealed and that the pleading had not been amended as was then permitted. The government mistakenly interprets Judge Friendly's characterization of the reasoning of the first, unappealed district court's opinion as the holding of the Court of Appeals.

In addition to *Central Rivers*, we find support for our conclusion in the cases that have addressed the issue of when a claim for contribution arises under the Federal Tort Claims Act ("FTCA"). That Act, like the SIAA, waives the sovereign immunity of the United States in circumstances where a similarly situated private party would be liable to another, *United States v. Yellow Cab*, 340 U.S. 543, 548 (1951), and also like the SIAA, it was adopted against a backdrop of limitations law consistently holding that claims for contribution did not accrue at the time of injury to the third party. The courts that have addressed the analogous issue under the FTCA have concluded that a claim for contribution does not accrue until the claimant has paid, or been held liable for, more than his or her share of a common liability. *United States Lines, Inc. v. United States*, 470 F.2d 487, 489 (5th Cir. 1972) ("Provided there exist a right to contribution or indemnity [against the government], the applicable two year statute of limitations (28 U.S.C.A. § 2401(b)) does not run from the date of injury but from the time the right to contribution or indemnity accrued, namely, date of payment to the seaman. . . ."); *General Electric Co. v. United States*, 620 F.Supp. 160, 161 (D.C. Minn. 1985) ("In an action against the United

States for contribution, a claim accrues when the claimant pays the judgment upon which the cause of action for contribution is based."); *see also Yellow Cab*, 340 U.S. at 552 (indicating that a right to contribution under the FTCA accrues when the claimant pays the underlying judgment); *Chicago, Rock Island & Pacific Ry Co. v. United States*, 220 F.2d 939, 942 (7th Cir. 1955) ("It is plain, of course, that no claim [for indemnity] accrued to plaintiff against the government prior to the date when the former made payment to its employee."). We have found no contrary authority under the FTCA.[4]

IV.

We will reverse and remand for further proceedings consistent with this opinion.

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4. The government argues that the Court of Appeals for the District of Columbia Circuit has adopted a different rule. We disagree. In *Keleket X-Ray Corp v. United States*, 275 F.2d 167 (D.C. Cir. 1960), the court stated that the cause of action for contribution did not accrue before the third-party plaintiff had been sued by the plaintiff. The court, holding that the contribution suit was not time-barred, did not need to address, and did not reach, the question of whether the cause of action actually accrued at a later date.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 87-2483

SEA-LAND SERVICE, INC.

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

OPINION

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WOLIN, District Judge

In the instant action, this Court is faced with defendant's motion to dismiss plaintiff's suit on the theories that (1) plaintiff's claim for contribution is barred by the statute of limitations and (2) there is no legal duty to indemnify plaintiff. For the following reasons, defendant's motion is granted.

I. *BACKGROUND*

This action arises from a wrongful death action brought in the New York State Supreme Court for New York County captioned *Anna Claire Swogger, as Executrix of the Estate of David Swogger v. Waterman Steamship Corp., et al.*, Index No. 13163/79 (the "*Swogger* action"). The *Swogger* action, commenced on April 13, 1979, was originally brought by David Swogger as a seaman's action for personal injury pursuant to the Jones Act, 46 U.S.C. § 688, and general maritime law.[1] The complaint alleged that while working as a

1 On January 10, 1980, Swogger died, allegedly of malignant mesothelioma contracted as a result of his exposure to asbestos and asbestos-laden products aboard defendants' ships. Thereafter, his widow, Anna Claire Swogger, was subsequently named Executrix and the complaint was amended to add a cause of action for wrongful death.

marine engineer aboard thirteen vessels owned by five shipowner defendants (one of whom was Sea-Land Service, Inc.—the plaintiff herein), David Swogger was exposed to asbestos-containing products which caused him to contract a lung disease. Swogger's period of employment aboard these named vessels spanned 29 years from 1949 through 1978.

Discovery in the *Swogger* action indicated that David Swogger's complaint did not, however, seek recovery for his initial years at sea between the period 1943-1949. During this period, Swogger sailed exclusively aboard vessels owned and/or operated for the United States pursuant to General Agency Agreements by four shipping companies.[2]

In February, 1984, Sea-Land (a defendant in the *Swogger* action) filed a third-party complaint in New York State naming 52 third-party defendants, including asbestos manufacturers, shipyards, distributors and additional shipping companies. Included within this group of third-party defendants were the four shipowner-employers who, although not named as primary defendants in the *Swogger* action, operated ships for the United States during 1943-1948 pursuant to the above-noted General Agency Agreements. Pursuant to contractual relations and/or the Suits in Admiralty Act, 46 U.S.C. § 741 *et seq.* ("SIAA"), these four defendants, because they operated as agents of the United States, tendered their defenses to the United States whereupon Sea-Land agreed to their voluntary dismissal from the *Swogger* action.[3]

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2 These companies were: Exxon Co. U.S.A. (Standard Oil of New Jersey), Marine Transport Lines, Inc., Moore-McCormack Lines and United States Lines Co.

3 Sea-Land claims that it agreed to this voluntary dismissal with the understanding that the United States would raise no objection to the timeliness of the suit it proposed to bring in federal court (*i.e.*, the instant action). Such a claim, however, is without merit in light of the fact that the United States apparently informed Sea-Land that it had neither the authority nor the inclination to waive its statute of limitations defense. Moreover, regardless of

On June 24, 1985, Sea-Land reached a settlement in the *Swogger* action. Thereafter, Sea-Land made payments pursuant to that settlement. Exactly two years later, on June 24, 1987, Sea-Land ("plaintiff") filed the instant suit against the United States ("defendant") pursuant to the provisions of the Public Vessels Act, 46 U.S.C. § 782, *et seq.*, and general admiralty law. In this action, Sea-Land seeks indemnity or contribution from the United States for the sums it paid in settlement of the *Swogger* action due to Swogger's alleged exposure to asbestos while employed aboard the vessels owned or operated by the United States.

Currently, the United States moves to dismiss the complaint, claiming that (i) the action is barred by the applicable statute of limitations and (ii) the relationship between Sea-Land and the United States is such that no valid claim for indemnity exists.

II. *DISCUSSION*

A. *Statute of Limitations—Contribution*

Section five of the Suits in Admiralty Act, 46 U.S.C. § 745, provides, in pertinent part, that suits against the United States "may be brought only within two years after the cause of action arises . . . ." Defendant maintains, therefore, that plaintiff's action is now time-barred because the two-year statute of limitations began to run, at the latest, upon the date of David Swogger's death—January 10, 1980. Plaintiff, however, did not file the instant action for contribution and indemnity until June 24, 1987—more than seven-and-one-half years following Mr. Swogger's death. In response, plaintiff maintains that its cause of action did not

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whether such an agreement existed, this Court finds that as a matter of law it would have been unenforceable. *See, e.g., Nan Sing Marine Co., Ltd. v. United States*, 811 F.2d 1495, 1497-98 (Fed. Cir. 1987) (noting that there exists a split of authority as to whether two-year statute of limitations may be tolled in light of the fact that it is a jurisdictional prerequisite "unlike most limitations legislation applicable to private parties[ ]") (citation omitted).

accrue until June 24, 1985, the date of the settlement of the *Swogger* action. Thus, according to plaintiff its action was timely. Therefore, the issue before this Court with respect to the statute of limitations is the determination of precisely when plaintiff's cause of action in its contribution/indemnification action accrued.

(1) *The Government's Position.* In support of its argument that plaintiff's cause of action accrued in 1980, defendant cites *United New York Sandy Hook Pilots' Association v. United States*, 355 F.2d 189 (2d Cir. 1965) in which the Second Circuit stated:

> [T]he facts pleaded by [the party seeking contribution] gave rise only to a claim against a tortfeasor and that this became time-barred two years after the accident, *although the amount had not yet been established.* The settlement did nothing to change this.

Id. at 190-191 (emphasis added). *See also Complaint of American Export Lines, Inc.*, 568 F. Supp. 956, 964 (S.D.N.Y. 1983) ("when the Court of Appeals [in *Sandy Hook*] referred to 'a claim against a tortfeasor' that was barred by the two year limitations period . . . it was referring to a claim for contribution[ ]").

(2) *Sea-Land's Position.* In contrast to defendant's position, plaintiff asserts that a cause of action for contribution does not accrue at the time of the underlying injury, but rather when the party seeking contribution makes payment on the underlying claim. For example, in *Central Rivers Towing v. City of Beardstown*, 750 F.2d 565 (7th Cir. 1984), the Seventh Circuit held that a third-party contribution action against the United States brought pursuant to section 5 of the SIAA arose only upon the entry of judgment in the underlying action. The Seventh Circuit continued:

> The Suits in Admiralty Act provides that suits under it may be brought against the United States only within two years after the cause of action arises. 46 U.S.C. § 745. Noting that the plaintiff's cause of action against

> the United States would have arisen at the time of the accident, the government correctly states that a direct suit by the plaintiff would now be barred. But the government goes farther than this, arguing that as a result of its lack of liability to the plaintiff, it cannot share joint liability with the [defendant], and therefore the [defendant] can have no claim of contribution against it. In support of this proposition, the government cites numerous cases in which one joint tortfeasor was immune from tort liability to the plaintiff and the court held that it could not be held liable in contribution to the other tortfeasor.
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> We need not explore the government's list of arguably analogous precedent, since there are other and more persuasive cases involving statute of limitations defenses which are directly on point. The district court in this case disposed of the government's statute of limitations argument in rejecting its motion for summary judgment, holding that 'the third-party complaint and § 745 statute of limitations are governed by when a final judgment or payment is receive by a third party.' We find this to be a correct statement of the law.

Id. at 571-572. *See also Thornton v. Hull*, 515 F. Supp. 715, 716 (D. Mass. 1981) (notwithstanding two-year limitation of SIAA, third-party action for indemnification or contribution does not accrue until either final judgment or payment by third-party plaintiff to original plaintiff) (citations omitted). *But see Brown v. United States*, 615 F. Supp. 391, 407 (D. Mass. 1985) ("[t]o the extent [third-party plaintiff's] claim for indemnification is actually a claim for contribution, that claim is barred by the two year statute of limitations under the reasoning set out in the *Sandy Hook* case[ ]").

(3) *The Common Law/Admiralty Distinction.* The government does not contest Sea-Land's point that at common law "the fact that the statute of limitations has run against the original plaintiff's action does not bar a claim for con-

tribution, since that cause of action does not arise until payment." Prosser & Keeton, *The Law of Torts*, § 150 at 340 (5th Ed. 1984).[4] Instead, the government maintains that the character of the two-year limitation, inasmuch as it constitutes a substantive jurisdictional prerequisite as well as a temporal limitation, dictates the dismissal of plaintiff's action. In effect, the government asserts that there is a distinction, albeit arbitrary, between claims for contribution against a private party in general litigation and admiralty claims for contribution against the government.

This distinction, however, is not without support. In *Sandy Hook*, the Second Circuit noted that although a third-party plaintiff's contribution action was barred two-years after the underlying incident, an action for contractual indemnity would have been timely inasmuch as it did not accrue until two years after liability had been fixed. 355 F.2d at 191. Subsequently, *Sandy Hook* was interpreted as follows:

> *Sandy Hook* involved a distinction, for purposes of determining when a cause of action arises, between claims for contribution and claims for indemnity. It specifically discussed claims for contractual indemnity because no claim for tort indemnity was involved in *Sandy Hook*. On the facts, none was possible. A party may sue in admiralty for tort indemnity if he is vicariously liable for the culpable conduct of another, but he may not recover on this theory if he himself has been guilty of negligence.

American Export Lines, supra, 568 F. Supp. at 964 (emphasis in original) (footnote omitted; citations omitted). In *American Export Lines*, a case involving the collision of two privately owned ships, one of the shipowners attempted to bring a third party tort indemnification action against the United States. The *American Export Lines* court stated that under

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4 This rule is based on the equitable principle that the in action of the original plaintiff should not defeat a defendant/third-party plaintiff's right to contribution. *Keleket X-Ray Corp. v. United States*, 275 F.2d 167, 169 (D.C. Cir. 1960).

admiralty law there existed a substantive distinction between claims for contribution (premised entirely on the existence of joint tortfeasors) and those for indemnity (premised on the vicarious liability of the third-party defendant). 568 F. Supp. at 965 (citing *Twenty Transfer Corp. v. Tracy Towing Line, Inc.*, 1969 A.M.C. 1207 (S.D.N.Y. 1969); *Hallmark Ins. Co. v. Canadian Pacific R.R.*, 1978 A.M.C. 409 (W.D. Mich. 1977)). The Court concluded that even though the contribution claims as against the government were time-barred, the indemnification claims would not be dismissed because there existed the possibility that the government was vicariously liable. *American Export Lines*, 568 F. Supp. 965-966.

In turn, the *American Export Lines* case was interpreted as follows:

> Thus the *American Export Lines* court held that a tort indemnification action could be maintained where it was alleged that the government's negligence in designing a vessel's steering mechanism was the sole cause of a collision that occurred more than two years before the claim for indemnification was filed.

Brown v. United States, *supra*, 615 F. Supp. at 407. Accordingly, the *Brown* court concluded that:

> To the extent that [third-party plaintiff's] claim for indemnification is actually a claim for contribution, that claim is barred by the two year statute of limitations under the reasoning set out in the *Sandy Hook* cases.

615 F. Supp. at 407.

This Court acknowledges that the *Sandy Hook/American Export Lines/Brown* line of cases is not embraced by all courts. Specifically, this Court notes that *Thornton v. Hull*, *supra*, and *Central Rivers Towing v. City of Boardstown*, *supra*, stand for the proposition that third-party tort actions under 46 U.S.C. § 745 sounding either in contribution *or* indemnification do not accrue until such time as liability has been established in the underlying action. *Thornton*, 515 F. Supp. at 716, *Central Rivers Towing*, 750 F.2d at 572. The *Thornton/Central Rivers Towing* line of cases, however,

nowhere acknowledges the existence of the *Sandy Hook* anomaly. Instead, both *Thornton* and *Central Rivers Towing* treat contribution and indemnification as a single theory under admiralty law. Inasmuch as both contribution and indemnity are concerned with the apportionment of liability they are similar. However, contribution arises from the liability of "a joint tortfeasor whose fault concurred as a proximate cause of the plaintiff's injuries, or to exonerat[e] active fault intervened as a superseding cause of the injuries." *White v. Johns-Manville Corp.*, 626 F.2d 243, 250 (4th Cir. 1981), whereas indemnification is "[d]esigned to shift the whole loss upon the more guilty [*i.e.*, "non-passive"] of the two tortfeasors." *Araujo v. Woods Hole, Martha's Vineyard, Nantucket Steamship Authority*, 693 F.2d 1, 3 (1st Cir. 1982) (citation omitted). And tort indemnification is inappropriate where the "party seeking indemnification was itself guilty of acts or proximately causing the plaintiff's injury[.]" *Woods Hole*, 693 F.2d at 3 (citing *Wedlock v. Gulf Mississippi Marine Corp.*, 554 F.2d 240, 243 (5th Cir. 1977).[5]

In light of this above-noted distinction, the paucity of relevant law in this Circuit and the fact that the *Sandy Hook* and *Central Rivers Towing* lines of cases seem irreconcilable as to the accrual date of contribution actions, this Court chooses to follow the *Sandy Hook* approach.[6] Although seemingly contrary to the general notion of contribution, the law of admiralty appears to be distinct unto itself; and it is not now within the province of this Court to amend that which has

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5 The substantive distinction between contribution and indemnity, which derives from the legal characterization of the two actions, directly implicates the accrual date for each. Under contribution, the defendant is characterized as a joint tortfeasor; moreover, he became a joint tortfeasor when the underlying action occurred and that is why the statute of limitations runs from the time the cause of action arose. Whereas under indemnity, the defendant is not a joint tortfeasor, but rather he only became an indemnitor at such time as liability was established for the underlying action. Accordingly, the statute of limitations runs from that time.

6 Moreover, the government maintains that *Central Rivers Towing* is distinguishable on the facts because there the government was well aware of an impending third-party defense from the date of the filing of the original suit.

withstood the test of time. Accordingly, this Court finds that, as a matter of law, plaintiff's contribution action is barred by the two-year statute of limitations of 46 U.S.C. § 745.[7]

B. *Active/Passive Liability—Indemnity*

Suffice it to say that at oral argument counsel for plaintiff represented that it could not support its claim for indemnity. Instead, counsel admitted that plaintiff's claim could be characterized strictly as that of contribution. Thus, for the reasons already noted *supra*, defendant's motion to dismiss must be granted in its entirety.

III. *CONCLUSION*

For all of the above-noted reasons, defendant's motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction is GRANTED in its entirety.

An appropriate order will issue.

Dated: July 13, 1988

/s/ ALFRED M. WOLIN
ALFRED M. WOLIN, U.S.D.J.

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7 With respect to Sea-Land's argument that this result wreaks unfairness upon it in its capacity to apportion liability as a third-party plaintiff, this Court notes that waivers of sovereign immunity are to be strictly construed. *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

Constitutional Provisions and Statutes Involved

Article I, Section 8, Clause 18. Enactment of Laws for Execution of Governmental Powers

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

* * * * *

5 U.S.C.

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that any agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers

authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

28 U.S.C.

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

* * * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air

Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

46 U.S.C. App.

§ 743. Procedure in cases of libel in personam

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree

against the United States or such corporation may include costs of suit, and when the decree may include costs of suit, and when the decree is for a money judgement, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder.

§ 745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims

Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided*, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further*, That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against

the master of any such vessel: *And provided further*, That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 742 of this Appendix unless upon a contract expressly stipulating for the payment of interest.

§ 746. Exemptions and limitation of liability

The United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

§ 808. Registration, enrollment, and licensing of vessels purchased, chartered, or leased; unlawful transactions; penalties

(a) Registration, enrollment, and licensing

Any vessel purchased, chartered, or leased from the Secretary of Transportation, by persons who are citizens of the United States, may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: *Provided*, That foreign-built vessels admitted to American registry on enrollment and license under this chapter, and vessels owned by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered by the Secretary of Transportation to any person a citizen of the United States, as provided in this chapter, may engage in the coastwise trade of the United States while owned, leased, or chartered by such a person.

(b) Necessity of registration, etc., for operation; laws, regulations, and liabilities applicable

Every vessel purchased, chartered, or leased from the Secretary of Transportation shall, unless otherwise authorized by the Secretary of Transportation, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all

laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein.

50 U.S.C. App.

§ 1291. Rights of American seamen on privately owned and operated American vessels extended to seamen employed to seamen employed through the War Shipping Administration; exceptions; definitions

(a) Officers and members of crews (hereinafter referred to as "seamen") employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act [42 U.S.C.A. § 301 et seq.], as amended by subsection (b)(2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended [5 U.S.C.A. § 8101 et seq.]; the Civil Service Retirement Act, as amended [5 U.S.C.A. § 8331 et seq.]; the Act of Congress approved March 7, 1942 (Public Law 490, Seventy-seventh Congress); or the Act entitled "An Act to provide benefits for the injury, disability, death, or detention of employees of contractors with the United States and certain other persons or reimbursement therefor", approved December 2, 1942 (Public Law 784, Seventy-seventh Congress) [42 U.S.C.A. § 1701 et seq.]. Claims arising under clause (1) hereof shall be enforced in the same manner as such claims would be

enforced if the seaman were employed on a privately owned and operated American vessel. Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act [46 App.U.S.C.A. § 741 et seq.], notwithstanding the vessel on which the seaman is employed is not merchant vessel within the meaning of such Act [said sections]. Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section [Mar. 24, 1943] may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration. Rights of any seaman under the Social Security Act [42 U.S.C.A. § 301 et seq.[, as amended by subsection (b)(2) and (3), and claims therefor shall be governed solely by the provisions of such Act, so amended. When used in this subsection the term "administratively disallowed" means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. When used in this subsection the terms "War Shipping Administration" and "Administrator, War Shipping Administration" shall be deemed to include the United States Maritime Commission with respect to the period beginning October 1, 1941, and ending February 11, 1942, and the term "seaman" shall be deemed to include any seaman employed as an employee of the United State through the War Shipping Administration on vessels made available to or subchartered to other agencies or departments of the United States.

Parents and Subsidiaries of Petitioner

Petitioner Sea-Land Service, Inc. is a wholly owned subsidiary of CSX Corporation. All subsidiaries of Petitioner are wholly owned. Petitioner, or one of its wholly owned subsidiaries, has an interest in the following foreign companies:

Arabian Container Terminal, Limited
Asia Terminals Limited
Asia Terminals (Thailand) Ltd.
CST (Shipping) Limited
Entremar, S.A.
Homoku A5 Terminal Administration Co., Ltd.
International Container Terminal Services, Inc.
Japan Container Services, Inc., Ltd.
Rokko RC-1 Terminal Administration Co., Ltd.
Sea-Land Container Terminal Administration Co., Ltd.
Sea-Land Mediterraneo y Cia Regular Colectiva
World Feederships, Inc.

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 90-1360

In the Supreme Court of the United States

OCTOBER TERM, 1990

SEA-LAND SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*, waives the sovereign immunity of the United States with respect to maritime tort claims arising out of the performance of discretionary government functions.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1360

SEA-LAND SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 919 F.2d 888. The opinion of the district court (Pet. App. 13a-22a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1990. The petition for a writ of certiorari was filed on February 26, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During World War II, the War Shipping Administration (WSA) was created to assume control of the Nation's merchant marine, to provide for its

rapid expansion, and to ensure its effective use in the prosecution of the war. See Exec. Order No. 9054, 3 C.F.R. 1086 (1938-1943 comp.). Most merchant vessels under the control of the WSA, both pre-existing vessels and those built to U.S. Maritime Commission specifications during the war, were operated by private shipping companies pursuant to general agency agreements with WSA. See *Report of the War Shipping Administrator to the President: The United States Merchant Marine at War* 33, 39-40 (1946). To resolve uncertainty as to the liability of the United States for injuries occurring on those vessels, Congress enacted the War Shipping Administration Clarification Act of 1943, ch. 26, § 1(a), 57 Stat. 45 (codified at 50 U.S.C. App. 1291(a)).[1] The Clarification Act provides that actions arising from injuries to seamen aboard merchant vessels under the control of the WSA may be brought under the Suits in Admiralty Act (SIAA), 46 U.S.C. App. 741 *et seq.*

The SIAA, enacted in 1920, waives the sovereign immunity of the United States with respect to certain maritime claims, including claims involving government-owned merchant vessels. The statute provides that "[i]n cases where if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States." 46 U.S.C. App. 742. The SIAA does not provide a cause of action against the United States, but acts only as a waiver of sovereign immunity, serving as a "jurisdictional hook upon which to hang a traditional admiralty claim." *Williams* v.

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[1] See S. Rep. No. 62, 78th Cong., 1st Sess. 5-6 (1943); H.R. Rep. No. 2572, 77th Cong., 2d Sess. 9 (1942).

Central Gulf Lines, 874 F.2d 1058, 1059 (5th Cir. 1989), cert. denied, 110 S. Ct. 843 (1990). See 2 M. Norris, *The Law of Seamen* §§ 28:1, 28:2, at 258-259, 260-261 (4th ed. 1985).

2. In this action under the SIAA, petitioner seeks indemnity or contribution from the United States for payments it made to settle a wrongful death action. Between 1949 and 1978, the decedent, David Swogger, served upon vessels owned by petitioner and four other private parties. The complaint in the wrongful death action alleged that Swogger contracted mesothelioma, a form of cancer, as a result of his exposure to asbestos aboard those vessels. In 1985, petitioner settled with Swogger's estate. Two years later, petitioner commenced this action, alleging that Swogger's disease was attributable, in whole or part, to his exposure to asbestos while he served, from 1943 to 1948, aboard WSA vessels. Pet. App. 2a-3a, 15a.

3. The district court granted the government's motion to dismiss the action. Pet. App. 13a-22a. The court noted that, with one exception, all of the courts of appeals to have addressed the issue had held that the SIAA does not waive sovereign immunity with respect to claims arising from the performance of discretionary governmental functions. *Id.* at 18a-19a. Even the Fourth Circuit case that appeared to reach a contrary conclusion, the district court continued, "ha[d] been eroded by subsequent decisions of that circuit." *Id.* at 19a. The court found the prevailing interpretation persuasive in view of "the separation of powers doctrine" and "the general rule that waivers of sovereign immunity [are] strictly construed." *Id.* at 19a-20a. The court also held that petitioner's suit sought to impose liability on the United States

for a decision "based on policy and discretion"—the wartime decision "to construct and operate a merchant marine fleet on an expedited and uniform basis." *Id.* at 22a.

4. In the court of appeals, petitioner renewed its contentions that the SIAA is a waiver of sovereign immunity even with respect to actions challenging the exercise of governmental discretion and that the claims in this case were beyond the scope of any discretionary function exception to the SIAA. The court of appeals rejected both contentions and affirmed the dismissal of the action. Pet. App. 1a-12a.

a. With respect to the scope of the SIAA, the court of appeals began with the principles, recognized by this Court, that "a waiver of sovereign immunity cannot be lightly implied, but must be unequivocally expressed" (Pet. App. 4a) and that "statutes placing the United States in the same position as a private party * * * have been read narrowly to preserve certain immunities that the United States has enjoyed historically" (*ibid.*). "[W]hen the issue is whether Congress has waived sovereign immunity for the consequences of governmental policymaking," the court of appeals continued, "courts have recognized the sensitive nature of the issue and have declined to find a waiver absent unmistakable evidence of such an intent." *Id.* at 5a.

The court acknowledged that the SIAA, unlike the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2680(a), does not contain an express discretionary function exception. Pet. App. 6a. Nevertheless, relying on *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 810 (1984), the court concluded that the FTCA exception "merely makes explicit what would otherwise

be implicit" and that "a general waiver of sovereign immunity" should not be read "to include a waiver of immunity with respect to damage occasioned by policy decisions." Pet. App. 6a-7a. The court held that the SIAA, "which explicitly contains only a general waiver, also implicitly contains a discretionary function exception to its waiver of sovereign immunity." *Id.* at 7a.

b. The court also held, in accordance with decisions of the Second and Fifth Circuits, that the discretionary function exception implicit in the SIAA bars petitioner's claims in this case. Pet. App. 8a-11a; see *In re Joint E. & S. Dists. Asbestos Litigation*, 891 F.2d 31, 34-36 (2d Cir. 1989); *Gordon* v. *Lykes Bros. S.S. Co.*, 835 F.2d 96, 98-99 (5th Cir.), cert. denied, 488 U.S. 825 (1988). In view of the government's effort "to assure the most effective utilization of the shipping of the United States for the successful prosecution of the war," the court concluded, "the use of asbestos in ships, whether traceable to a conscious decision or not, was a policy judgment." Pet. App. 10a. That determination, the court continued, applied to the use of ships after the war and to all of petitioner's theories of liability, including those based on an alleged duty to warn of the dangers of asbestos and on a warranty of seaworthiness. *Id.* at 10a-11a.

ARGUMENT

This is at least the fifth case in which the Court has been asked to review the question whether the United States is subject to suit under the SIAA for the exercise of governmental discretion.[2] As in the earlier cases, petitioner argues (1) that the language of the Act and the absence in the SIAA of an express discretionary function exception compel the conclusion that the government is liable on such claims, and (2) that there is a conflict on this issue between *Lane* v. *United States*, 529 F.2d 175 (4th Cir. 1975), and decisions of other courts of appeals. Those contentions are without merit, and further review is not warranted.

1. With its decision in this case, the Third Circuit joined seven other circuits that have held that the SIAA does not waive the government's sovereign immunity with respect to claims arising from the performance of discretionary functions. *Canadian Transport Co.* v. *United States*, 663 F.2d 1081, 1085-1087 (D.C. Cir. 1980); *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977); *Brown* v. *United States*, 790 F.2d 199, 200 n.1 (1st Cir. 1986), cert. denied, 479 U.S. 1058

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[2] *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977) (No. 76-807); *Bearce* v. *United States*, 614 F.2d 556, 559-560 (7th Cir.), cert. denied, 449 U.S. 837 (1980) (No. 79-1961); *Brown* v. *United States*, 790 F.2d 199 (1st Cir. 1986), cert. denied, 479 U.S. 1058 (1987) (Nos. 86-202 and 86-528); *In re Ohio River Disaster Litigation*, 862 F.2d 1237 (6th Cir. 1988), cert. denied, 493 U.S. 813 (1989) (No. 88-1904). See also *Gordon* v. *Lykes Bros. S.S. Co.*, 835 F.2d 96, 98-99 (5th Cir.), cert. denied, 488 U.S. 825 (1988) (No. 87-2035); *Chute* v. *United States*, 610 F.2d 7, 12-13 (1st Cir. 1979), cert. denied, 446 U.S. 936 (1980) (No. 79-1311).

(1987); *In re Joint E. & S. Dists. Asbestos Litigation*, 891 F.2d at 34-36; *Wiggins* v. *United States*, 799 F.2d 962, 964-966 (5th Cir. 1986); *Gordon* v. *Lykes Bros. S.S. Co.*, 835 F.2d at 98-99; *Gemp* v. *United States*, 684 F.2d 404, 408 (6th Cir. 1982); *Chotin Transp., Inc.* v. *United States*, 819 F.2d 1342, 1347 (6th Cir.) (en banc), cert. denied, 484 U.S. 953 (1987); *In re Ohio River Disaster Litigation*, 862 F.2d 1237, 1244 (6th Cir. 1988), cert. denied, 493 U.S. 813 (1989); *Estate of Callas* v. *United States*, 682 F.2d 613, 619 (7th Cir. 1982); *Bearce* v. *United States*, 614 F.2d 556, 559-560 (7th Cir.), cert. denied, 449 U.S. 837 (1980); *Williams* v. *United States*, 747 F.2d 700 (11th Cir. 1984), aff'g 581 F. Supp. 847 (S.D. Ga. 1983).

The consensus among the courts of appeals on this issue is well founded. As recognized by the Congress that enacted the Federal Tort Claims Act and by this Court, the FTCA's express discretionary function exception codifies a limitation on judicial review that courts were expected to implement in any event. *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 810 (1984); *Dalehite* v. *United States*, 346 U.S. 15, 27 (1953).[3] As the Court explained in *Varig Airlines*, 467 U.S. at 810:

> It was believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction; nevertheless, the specific exception was added to make clear

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[3] See *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 29 (1942) (statement by Assistant Attorney General Francis M. Shea).

> that the Act was not to be extended into the realm of the validity of legislation or discretionary administrative action.

Thus, there is nothing anomalous in the recognition of the same limitation in the SIAA, even in the absence of an express exception.

The prevailing interpretation of the SIAA is grounded in the courts' longstanding reluctance to "enquire how the executive, or executive officers, perform duties in which they have a discretion." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Imposition of liability on the theory that policymakers have wrongfully exercised their lawful discretion would permit " 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," *Varig Airlines*, 467 U.S. at 814.[4] The courts

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[4] Accord, *e.g.*, Pet. App. 5a ("the imposition of liability for damages occasioned by governmental policymaking would necessarily involve a very substantial, if not prohibitive, social cost not only in terms of the imposed liability itself, but also in terms of the constraining effect of that liability on the decisions of governmental policymakers"); *Gercey* v. *United States*, 540 F.2d at 539 ("Were there no * * * immunity for policy making decisions, all administrative and legislative decisions concerning the public interest in maritime matters would be subject to independent judicial review in the not unlikely event that the implementation of those policy judgments were to cause private injuries. That, in our view, would be an intolerable state of affairs."); *Canadian Transport Co.* v. *United States*, 663 F.2d at 1085; *In re Joint E. & S. Dists. Asbestos Litigation*, 891 F.2d at 35.

The intrusive judicial review that would flow from petitioner's interpretation of the SIAA is not, as petitioner suggests (Pet. 17-18), analogous to review under the Administrative Procedure Act. Under the APA, the courts' role is limited to determining whether agency action is violative of

have quite properly refused to read the broad language of the SIAA to embody such a radical extension of judicial inquiry into the exercise of governmental discretion. As the court of appeals explained, "Congress must speak with unmistakable intent in order to waive tort immunity for the government's discretionary functions." Pet. App. 8a.

As a general matter, "a waiver of sovereign immunity cannot be lightly implied, but must be unequivocally expressed." *United States* v. *Mottaz*, 476 U.S. 834, 851 (1986). Accord *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986) (waivers of sovereign immunity are construed "strictly in favor of the sovereign"); *McMahon* v. *United States*, 342 U.S. 25, 27 (1951) (recognizing the applicability of that canon to legislation enacted for the benefit of seamen). Moreover, as the courts have recognized, the need to avoid judicial intrusion into executive policymaking implicates important principles of separation of powers. *E.g.*, *Canadian Transport Co.* v. *United States*, 663 F.2d at 1086; *In re Joint E. & S. Dists. Asbestos Litigation*, 891 F.2d at 35. See also *Caban* v. *United States*, 671 F.2d 1230, 1233 (2d Cir. 1982) (discretionary function exception "protects the principles embodied in the separation of powers doctrine by keeping the judiciary from deciding questions consigned to the executive and legislative branches of the

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the Constitution or a statute or is arbitrary and capricious, and relief is designed to enforce compliance with those standards. By contrast, under the regime petitioners advocate, the exercise of policymaking discretion would be measured against standards of negligence or, under the theory advanced in this case, strict liability, and the United States would be required to pay damages.

government"). The prevailing interpretation of the SIAA gives due weight to those considerations.[5]

The consensus among the courts of appeals finds further support in a 1960 amendment to the SIAA. Prior to that time, the statute was limited to admiralty claims involving merchant vessels. The 1960 amendment extended the SIAA to any action against the United States that would have been maintainable in admiralty "if a private person or property were involved." Act of Sept. 13, 1960, Pub. L. No. 86-770, § 3, 74 Stat. 912 (codified at 46 U.S.C. App. 742). As amended, the SIAA reaches certain maritime tort claims that would otherwise be brought under the FTCA.[6] Indeed, because there is an exception to the FTCA for claims maintainable under the SIAA, 28 U.S.C. 2680(d), the effect of the SIAA amendment was to make that statute the exclusive vehicle for such actions.

If petitioner's reading of the SIAA is correct, the 1960 amendment eliminated the discretionary function exception with respect to those types of claims.[7]

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[5] Contrary to petitioner's assertion (Pet. 14-15), the court of appeals did not reach the question whether the separation of powers doctrine compels recognition of a discretionary function exception for claims brought under the SIAA. Rather, the court made clear that the intrusive judicial review entailed by petitioner's position was one of several bases for insisting on a clear and unambiguous congressional intention to waive sovereign immunity for damages actions arising from government policymaking. Pet. App. 5a, 8a.

[6] See *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 172 (1976).

[7] For instance, in *In re Ohio River Disaster Litigation*, *supra*, the United States was sued under the SIAA for claims arising from its operation of a system of dams on the Ohio River. Under petitioner's view, those claims should not have been subject to any discretionary function exception.

The language and legislative history of the amendment provide no support whatever for that view. The sole purpose of the 1960 amendment was to eliminate confusion concerning the proper forum for certain maritime actions; it did not alter the scope of preexisting waivers of sovereign immunity or the principles governing liability in tort suits against the government. See generally *United States* v. *United Continental Tuna Corp.*, 425 U.S. at 170-178. Congress must have understood—consistent with the belief underlying the enactment of the discretionary function exception to the FTCA, see pp. 7-8, *supra*—that the SIAA did not authorize actions based upon discretionary functions and that the transfer of some suits from the civil to the admiralty side of the district courts' dockets would not expand the tort liability of the United States. See *Bearce* v. *United States*, 614 F.2d at 558-560.

2. Petitioner's elaborate review of the history of the SIAA and the seaman's cause of action for the unseaworthiness of a vessel (Pet. 5-13) casts no doubt on the prevailing interpretation of that statute. Nothing in the legislative history of the SIAA or decisions of this Court applying that statute touches on the question whether the United States should be held liable in damages based upon the exercise of governmental discretion. The considerations underlying the prevailing interpretation of the SIAA have as much force with respect to claims based upon the alleged unseaworthiness of vessels as to any other theory of liability. As the Fifth Circuit observed in *Gordon*, the immunity of the United States for the performance of discretionary functions "cannot be overcome by clothing the discretionary act in the maritime uniform of a breach of duty to provide a seaworthy vessel.

Nomenclature, even when backed by the traditions of admiralty law, must yield to the force of those deep roots that impart strength to the discretionary function exception." 835 F.2d at 100. Accord *In re Joint E. & S. Dists. Asbestos Litigation*, 891 F.2d at 37.

As the facts of this case dramatically demonstrate, the imposition of liability on the United States based upon the exercise of governmental discretion does not follow from the SIAA's purpose to eliminate competitive inequality between government-owned and private merchant vessels. As the Third Circuit and two other courts of appeals have recognized, claims of the type asserted in this case arise out of a massive government program to marshal and expand the Nation's merchant shipping in order to win a global war. To that end, the government assumed control over the existing merchant fleet and commissioned a huge number of new vessels employing existing designs and materials, including asbestos.[8] Under petitioner's theory, the government would be held strictly liable, regardless of fault, for asbestos-related injuries attributable to those efforts.

The statements assembled by petitioner from the legislative history of the SIAA and this Court's decisions suggest no intention to achieve any such result. The principle that the government and private shipowners should receive equal treatment does not support attaching liability to the exercise of governmental policymaking authority. "[I]t is not a tort for government to govern." *Dalehite* v. *United States*, 346 U.S. at 57 (Jackson, J., dissenting).

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[8] Pet. App. 8a-12a; *In re Joint E. & S. Dists. Asbestos Litigation*, 891 F.2d at 35; *Gordon* v. *Lykes Bros. S.S. Co.*, 835 F.2d at 99-100.

3. The asserted conflict between *Lane* v. *United States*, 529 F.2d 175 (4th Cir. 1975), and all other pertinent decisions does not call for this Court's review. *Lane* was the first decision to address the question whether the SIAA waives sovereign immunity for the performance of discretionary functions, and the court's cursory analysis did not even allude to the grounds that are now uniformly understood to foreclose such a waiver. Moreover, in *Faust* v. *South Carolina State Highway Dep't*, 721 F.2d 934, 939 (1983), cert. denied, 467 U.S. 1226 (1984), the Fourth Circuit determined that the government could not be held liable in an action under the SIAA for an allegedly negligent breach of a statutory duty to regulate obstructions in navigable waterways. Although the decision was not framed in terms of the discretionary function exception as such, the court cited with approval decisions suggesting that the SIAA does not waive sovereign immunity with respect to "an unreviewable discretionary function." *Ibid.* As the Fifth Circuit observed in declining to follow *Lane*, "[i]t can fairly be said that the Fourth Circuit is no longer on record as having held unassailably that no discretionary function exception is implied in the [SIAA]. It has weakened or cast doubt upon the holding in *Lane*." *Wiggins* v. *United States*, 799 F.2d at 965. Accord *In re Joint E. & S. Dists. Asbestos Litigation*, 891 F.2d at 35.*

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* The reasoning of *Magno* v. *Corros*, 630 F.2d 224, 229 (1980), cert. denied, 451 U.S. 970 (1984), in which the Fourth Circuit rejected a claim that the United States could be held liable for negligence in marking a dike with navigational aids, also casts doubt on *Lane*. There, citing *Gercey* v. *United States*, *supra*, the court observed that imposition of liability based upon alleged negligence in marking obstruc-

Significantly, we are aware of no case since *Lane* in which the Fourth Circuit has allowed an action to proceed under the SIAA when that action was based upon the exercise of policymaking discretion. It thus appears that, even in the Fourth Circuit, *Lane* has no continuing significance. Until such time as the Fourth Circuit breathes new life into that aberrant decision, there is no warrant for the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1991

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tions would "in effect direct the Coast Guard how to spend its limited resources." 630 F.2d at 229.

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(3)

No. 90-1360

In the Supreme Court of the United States

OCTOBER TERM, 1990

SEA-LAND SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

In this case, petitioner seeks further review of the question whether the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*, waives the sovereign immunity of the United States with respect to maritime tort claims arising out of the performance of discretionary governmental functions. Petitioner argues that there is a conflict on that question between *Lane* v. *United States*, 529 F.2d 175 (4th Cir. 1975), and decisions of other courts of appeals. See Pet. 21-24. For reasons stated in detail in our brief in opposition, it is our position that—in light of intervening decisions in other circuits and in the Fourth Circuit itself—there is no conflict warranting this Court's review. See Br. in Opp. 13-14.

We are filing this brief to call the Court's attention to the Fourth Circuit's recent decision in *Tif-*

fany v. *United States*, Nos. 90-3014, 90-3022 (Apr. 30, 1991). (A copy of this opinion is attached as an appendix.) In *Tiffany*, the Fourth Circuit dismissed an action against the United States under the SIAA and the Death on the High Seas Act, 46 U.S.C. App. 761-767, on the ground that entertaining the action would "violate separation of powers principles which inform the discretionary function exceptions to the Federal Tort Claims Act and the Suits in Admiralty Act." App., *infra*, 2a. In reaching that conclusion, the court cited to decisions from other circuits recognizing such an exception to the SIAA (including the court of appeals' decision in the instant case), and it specifically concluded that *Lane* had been narrowed by *Foust* v. *South Carolina State Highway Dep't*, 721 F.2d 934 (4th Cir. 1983). App., *infra*, 12a-13a & n.*. In our view, the opinion lends additional support to our position that there is no conflict between the Fourth Circuit and other circuits that calls for this Court's review.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MAY 1991

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 90-3014, 90-3022

PATSY O. TIFFANY, Administratrix and Personal Representative of the Estate of Henry H. Tiffany, Deceased, Plaintiff-Appellee, v. UNITED STATES OF AMERICA, Defendant & Third Party Plaintiff-Appellant, v. BRANDON LADD CORPORATION, Third Party Defendant-Appellee. PATSY O. TIFFANY, Administratrix and Personal Representative of the Estate of Henry H. Tiffany, Deceased, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant & Third Party Plaintiff-Appellee, v. BRANDON LADD CORPORATION, Third Party Defendant-Appellee

January 7, 1991, Argued

April 30, 1991, Decided

Appeals from the United States District Court for the Western District of Virginia, at Charlottesville. James H. Michael, Jr., District Judge. CA-84-100-C.

JUDGES: Wilkinson and Wilkins, Circuit Judges, and Ellis, United States District Judge for the Eastern District of Virginia, sitting by designation. Judge Wilkinson wrote the opinion, in which Judge Wilkins and Judge Ellis joined.

OPINION BY: WILKINSON

OPINION: Henry Tiffany and six passengers were killed following a midair collision between their

Beech Baron airplane and a United States F-4C fighter jet. Tiffany had failed to activate a flight plan and thus had entered an air defense zone off the eastern coast of the United States as an unidentified and potentially hostile aircraft. Military authorities had dispatched two fighter jets to identify visually the unknown plane. The collision occurred in poor weather conditions seconds after one of the jets instituted a sharp left bank to avoid Tiffany's Baron. Tiffany's widow brought suit against the United States under the Death on the High Seas Act, 46 U.S.C. §§ 761-68, alleging that the military pilot and ground control had been negligent in their conduct of the intercept. The district court returned a verdict in favor of Tiffany. Because to entertain the allegations of negligence in this case would lead us to violate separation of powers principles which inform the discretionary function exceptions to the Federal Tort Claims Act and the Suits in Admiralty Act, we reverse the judgment.

I.

Henry Tiffany, a licensed civilian pilot, planned to fly his small Beech Baron airplane with six passengers from Nassau, Bahamas to Norfolk, Virginia on January 3, 1983. Although Tiffany was aware that the United States Customs Service required him to pass through Customs in Florida, see 19 C.F.R. § 6.14 (1983) (in 47 Fed. Reg. 12,621-22 (1982)), he nevertheless attempted to file with the Bahamian Flight Service Station a flight plan for direct travel to Wilmington, North Carolina instead. The Bahamian authorities refused to accept Tiffany's initial flight plan and persuaded Tiffany to modify the plan to include a stop at Fort Pierce, Florida in order to satisfy the Customs requirement.

Filed flight plans are vital for all planes traveling into United States air zones. This is true not only because of Customs regulations but because of our system of national defense as well. Extending hundreds of miles into the Atlantic Ocean from the eastern coast of the United States is an Air Defense Identification Zone (ADIZ) established by the North American Air Defense Command (NORAD), an agent of the Department of Defense. NORAD is a joint military command composed of American and Canadian forces which have responsibility for maintaining the aerial defense of the North American continent. Its peacetime mission is "to detect and identify any unusual air activity within the perimeter areas of the North American Continent which might be prejudicial to the national interests, or indicate an imminent air attack against vital targets in the United States and Canada, and to restrict violations of sovereign airspace." NORAD Regulation 55-14 ¶ 2.a (May 5, 1980). To achieve these goals, NORAD must identify "all airborne objects detected entering or operating within an identification zone." Id. P 5.a.

Both to facilitate that task and to protect civilian aircraft, Federal Aviation Regulations require all aircraft intending to penetrate an ADIZ to first file a flight plan. 14 C.F.R. § 99.11 (1983). If NORAD radar shows an aircraft in the ADIZ and that aircraft correlates with a filed flight plan, then NORAD can classify the plane as "friendly" and take no further steps towards verifying its identity. If the observed aircraft does not correlate with a filed flight plan, then NORAD must investigate further. This process is often accomplished by launching armed fighter planes to observe and visually identify the unknown aircraft. Relevant information may also be

collected from a number of sources, including Customs officials, adjacent air defense control facilities, other aircraft in the vicinity of the unknown, and civilian Air Traffic Control facilities, which may possess late flight plan or radar information.

NORAD has two minutes from the time it first detects an aircraft in an ADIZ to classify it as "friendly." NORAD Regulation 55-14 ¶ 5.c. After that time it must classify the aircraft as "unknown" and "continuously pursue[]" all methods of identification. Id. ¶ 6.b.3. No classification is ever permanent; even a plane initially recognized as "friendly" can be reclassified if it creates "suspicion as to its intent by reason of course, speed, altitude, radio/telephone procedures, maneuvers, flight size . . . or other abnormality." Id. ¶¶ 5.c.1, 6.b.2. In 1982, the year before Tiffany's crash, the 20th NORAD Region, operating out of Fort Lee Air Force Station near Petersburg, Virginia, encountered two hundred thirty-eight "unknown" planes. Interceptor aircraft were launched in one hundred ninety-two instances and visually identified sixty-six planes. The remainder were reclassified "friendly" on the basis of information received from other military or civilian facilities. Also in 1982, the 20th NORAD Region intercepted ten Soviet bloc aircraft operating off the east coast between Florida and Virginia.

Despite the tremendous practical importance as well as the legal necessity of filing accurate flight plans, Tiffany left Nassau slightly before 2:00 p.m. on January 3 without ever activating his modified flight plan. Flight plans that have been filed but not activated within one hour of takeoff are considered void. Thus, Tiffany was flying without an official flight plan and without any verified destination.

Apparently he had decided against complying with Customs regulations and instead chosen to follow his original plan to fly directly north from Nassau. In addition, although other federal regulations required that he contact FAA traffic controllers in the United States before entering an ADIZ, 14 C.F.R. § 99.21 (1983), Tiffany failed to establish radio contact with any FAA Air Traffic Control facility until 4:31 p.m., when he was well within the ADIZ—by his estimate a mere fifty miles off the North Carolina coast.

A few minutes after 4:00 p.m., the 20th NORAD Region's radar system in Fort Lee, Virginia (FERTILE) detected an aircraft within the ADIZ that was heading north towards the North Carolina coast. The plane did not correlate with any filed flight plan and NORAD consequently classified it as "unknown." Two F-4 fighter planes were launched from an Air Force base in North Carolina to determine visually the type of the unindentified aircraft. The military planes reported "popeye" conditions at altitudes below thirteen to fourteen thousand feet, meaning that visibility was extremely restricted because of clouds. One of the F-4's attempted to make a visual identification pass of the unknown plane but its angle of approach was too steep and the pass was canceled.

Meanwhile, Tiffany had established radio contact at 4:31 p.m. with Federal Aviation Administration (FAA) air traffic controllers in Leesburg, Virginia. Although his Baron did not yet appear on the FAA radar system, Tiffany informed the controllers that he was approximately fifty miles south of New Bern, North Carolina and flying at an altitude of 9500 feet. At 4:37 p.m., however, he corrected his position and indicated he was actually fifty-six miles from Wil-

mington, North Carolina, a city located seventy-five miles southwest of New Bern. He also gave the air traffic controllers the make and model of his aircraft, information that NORAD would require before changing the plane's status to "friendly" based on FAA communications.

Both the FAA and Tiffany, as civilian entities, operated on VHF radio frequencies, while the military operated on UHF frequencies. Thus, although Tiffany could communicate with the FAA, and the F-4's could communicate with NORAD ground control (FERTILE), the Baron and the military aircraft could not contact each other. Exchanges between the military and civilian systems could occur only through separate ground circuits. Information that Tiffany relayed to FAA controllers thus had to pass through numerous hands to reach decision makers at FERTILE, a process which incorporated some delay. FERTILE control was in contact with the FAA throughout the intercept process.

At 4:41 p.m., a few minutes after Tiffany had given civilian authorities his corrected position, one of the F-4's, with call sign "JL-26," established contact with Tiffany's Baron by on-board radar. Seconds later, that plane "called a Judy," or indicated that it was taking control of the intercept and would complete the identification through use of its on-board radar. What happened next is not entirely clear. At 4:42:20, the FAA sent a message to FERTILE which indicated that it had positively identified Tiffany by radar and that the Baron was six to seven miles ahead of the fighter planes. Although FERTILE received at least part of this transmission, an official transcript showed that some of the message had not been received. Nevertheless, at 4:43:42, the status of the unknown track was changed to "friendly" in

FERTILE's computer system, and at 4:44:21, the FERTILE control officer decided to terminate the intercept. That decision was relayed to plane JL-26 at 4:44:42, a few seconds before the collision.

During this period, JL-26 had been approaching Tiffany from behind; the fighter was below the Baron and to its left, according to both the ground radar reconstruction and the pilot's testimony based on his on-board radar. Ground control had instructed the F-4 to maintain at least a five hundred foot separation from the unknown. As JL-26 drew nearer, its radar screen displayed a "Break X," meaning that the plane had approached so close to the target that it could not fire its missiles. A Break X occurs at a distance of approximately one-half nautical mile. The F-4 then initiated a sharp left bank to break off the intercept.

While JL-26 was rapidly gaining ground, FAA controllers informed Tiffany that two F-4's were behind him. They also requested that Tiffany head towards New Bern, North Carolina instead of towards Norfolk. That direction would have required that Tiffany make a left turn. The FAA transcript shows that around 4:44 p.m., Tiffany responded, "we're fading to the right ah we've deviated . . . yea we can go direct New Bern now." Within seconds, the F-4's left wing collided with the Baron. The smaller plane fell into the Atlantic and no survivors were located. Although damaged, the F-4 was able to return to its home base.

The accident proved a difficult one to reconstruct. A radar reconstruction report by the National Transportation Safety Board (NTSB) confirmed that the F-4 had been steadily gaining altitude and then initiated a sharp left turn (roll angle of greater than twenty degrees) at least eight seconds before it col-

lided with Tiffany's Baron. A second report by the NTSB analyzed the damage to the F-4's left wing and the relative air speeds of the two airplanes. That collision report indicated that the F-4 had been descending relative to the Baron, and that the difference in roll (or turn) angle between the two planes had been only 3.6 degrees. The NTSB harmonized the two reports by concluding that the Baron had also initiated a left turn. If the Baron had not changed altitude but had begun a left turn, the ascending F-4 could have impacted the smaller plane and the difference in turning angles would have appeared as if the F-4 had been descending on the Baron. The radar reconstruction did not indicate that Tiffany had initiated a left turn, however. Possible explanations of that discrepancy include a masking effect due to the larger F-4, a gap in the radar coverage due to the time between radar antenna revolutions, and an error in the collision report because Tiffany did not actually turn left.

Tiffany's wife, as the representative of his estate, brought suit in the United States District Court for the Western District of Virginia against the United States under the Death on the High Seas Act (DOSHA), 46 U.S.C. §§ 761-68, claiming that the United States negligently caused Tiffany's death. Brandon Ladd Corporation, which leased the Beech Baron to Tiffany, sought damages from the United States to compensate for the loss of the plane. The United States brought a counterclaim against Tiffany's estate for damage to the F-4 jet and sought contribution from Brandon Ladd as a third-party defendant. The survivors of the six passengers initiated suits against both Tiffany and the United States which were settled.

A bench trial was conducted. The district court found that the government was negligent because it failed to terminate the intercept when it had sufficient information to do so, because ground control failed to tell the pilot of JL-26 to correct a 180 foot error in its altimeter, and because the pilot "continued a mission designed for a visual identification in weather effectively precluding such an identification, misidentified the position of the Baron aircraft relative to its position, turned left and ascended when the procedures called for a descent and a right turn, and failed to maintain the proper amount of vertical separation." The court found the United States liable to Tiffany's estate for $1,394,342 in lost income from Tiffany's law practice, and liable to Brandon Ladd for $45,000 for the loss of the Baron.

The United States appeals.

II.

The negligence alleged in this case necessarily calls into question the government's most important procedures and plans for the defense of the country. Because providing for the national security is both a duty and a power explicitly reserved by the Constitution to the executive and legislative branches of government, the judiciary must proceed in this case with circumspection. If we were to hold that the United States acted negligently in conducting the defense of its eastern border, we would be interjecting tort law into the realm of national security and second-guessing judgments with respect to potentially hostile aircraft that are properly left to the other constituent branches of government.

A.

We first proceed to address the relation between separation of powers principles and the relevant federal statutes. Section 2 of the Suits in Admiralty Act (SAA), codified as amended at 46 U.S.C. §§ 741-52, allows suits against the United States if the plaintiff would have been able to bring an admiralty claim against a private party which acted as the government did. 46 U.S.C. § 742. Because the Death on the High Seas Act (DOHSA) provides Tiffany a cause of action in admiralty, see 46 U.S.C. § 761, the SAA allows the suit to proceed without a sovereign immunity bar. See Williams v. United States, 711 F.2d 893, 895 (9th Cir. 1983).

That a federal statute enables the courts to assert jurisdiction only begins the analysis, however. Constitutional demands must still be satisfied. Separation of powers is "a doctrine to which the courts must adhere even in the absence of an explicit statutory command." Canadian Transport Co. v. United States, 663 F.2d 1081, 1086 (D.C. Cir. 1980). That doctrine requires that we examine the relationship between the judiciary and the coordinate branches of the federal government cognizant of the limits upon judicial power. The Supreme Court, in Baker v. Carr, 369 U.S. 186, 217 (1962), identified a number of factors, any one of which may carry a controversy beyond justiciable bounds:

a textually demonstrable constitutional commitment of the issue to a cordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution with-

out expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Thus, if resolution of the issues presented by Tiffany requires us to move outside the customary areas of judicial competence or if other "prudential considerations counsel against judicial intervention," Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring), then we must conclude that the controversy is nonjusticiable.

In tort cases brought against the government, these constitutional concerns are addressed through recognition of a "discretionary function" exception to government liability. The Federal Tort Claims Act (FTCA), which governs accidents occurring within the borders of the United States, did not waive sovereign immunity for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The Supreme Court has further recognized Congress' belief that "claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction." United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 810 (1984). It is plain that the discretionary function exception to tort liability serves separation of powers principles by "preventing judicial 'second-guessing' of legislative and administrative decisions grounded in social, eco-

nomic, and political policy through the medium of an action in tort." Id. at 814. Were it otherwise, the cumulative force of liability "would seriously handicap efficient government operations." United States v. Muniz, 374 U.S. 150, 163 (1963).

The respect for separation of powers principles addressed through the discretionary function exception of the FTCA has been carried over into suits brought under DOHSA and SAA. Our recognition of the constitutional constraints on actions brought under those acts is not a novel phenomenon. We held in Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986), that a negligence action pursuant to DOHSA and SAA could not be maintained against a government military contractor because of separation of powers concerns. There we noted that it would have been unseemly for "a democracy's most serious decisions, those providing for common survival and defense, [to] be made by its least accountable branch of government." Id. at 405. Earlier, in Faust v. South Carolina State Highway Dept., 721 F.2d 934 (4th Cir. 1983), this court refused to review a negligence claim in admiralty that challenged the Corps of Engineers' discretionary issuance of a permit.* Each circuit that has considered the matter has concluded that actions brought under the SAA which would require the court to re-examine discretionary acts

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* In noting that "it has authoritatively been held that the exercise of the function to issue permits is an unreviewable discretionary function," the court in Faust necessarily narrowed Lane v. United States, 529 F.2d 175 (4th Cir. 1975), and recognized the existence of a discretionary function exception to the Suits in Admiralty Act in some circumstances. 721 F.2d at 939. We think for the reasons stated herein that this is one of those circumstances.

taken by the government must be dismissed. See Gercey v. United States, 540 F.2d 536, 539 (1st Cir. 1976); In re Joint E. and S. Dists. Asbestos Litigation, 891 F.2d 31, 35 (2d Cir. 1989) [hereinafter Asbestos]; Sea-Land Serv. Inc. v. United States, 919 F.2d 888, 891 (3d Cir. 1990); Wiggins v. United States, 799 F.2d 962, 966 (5th Cir. 1986); Gemp v. United States, 684 F.2d 404, 408 (6th Cir. 1982); Bearce v. United States, 614 F.2d 556, 560 (7th Cir. 1980); United States Fire Ins. Co. v. United States, 806 F.2d 1529, 1535 (11th Cir. 1986); Canadian Transport Co. v. United States, 663 F.2d 1081, 1086 (D.C. Cir. 1980); see also Complaint of Valley Towing Serv., 609 F. Supp. 298, 301 (E.D. Mo. 1985); Olympia Sauna Compania Naviera, S.A. v. United States, 670 F. Supp. 1498, 1504 (D. Or. 1987), aff'd without opinion, 1989 Am. Maritime Cases 1216 (9th Cir. 1988). "Were there no such immunity for basic policy making decisions, all administrative and legislative decisions concerning the public interest . . . would be subject to independent judicial review in the not unlikely event that the implementation of those policy judgments were to cause private injuries." Gercey, 540 F.2d at 539. We agree that assumption of such powers would be "intolerable under our constitutional system of separation of powers." Asbestos, 891 F.2d at 35.

While the doctrine of discretionary functions recognized under the FTCA and DOSHA thus informs our inquiry into the disposition of the present controversy, the discretionary function exception alone does not capture all the important aspects of this case. For "justiciability is of course not a legal concept with a fixed content or susceptible of scientific verifi-

cation. Its utilization is the resultant of many subtle pressures . . . ." Poe v. Ullman, 367 U.S. 497, 508 (1961) (Frankfurter, J.) (cited in Flast v. Cohen, 392 U.S. 83, 95 (1968)).

B.

The present controversy implicates a discretionary decision of the most serious sort. It involves a civilian injury that followed from actions taken in actual military defense of our country. Of the legion of governmental endeavors, perhaps the most clearly marked for judicial deference are provisions for national security and defense. See Rostker v. Goldberg, 453 U.S. 57, 64-67 (1981). The decisions whether and under what circumstances to employ military force are constitutionally reserved for the executive and legislative branches. See, e.g., U.S. Const. art. II, § 2; art. I, § 8. With regard to decisions to employ military troops, "it is not the function of the Judiciary to entertain private litigation . . . which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region." Johnson v. Eisentrager, 339 U.S. 763, 789 (1950). "Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." Chappell v. Wallace, 462 U.S. 296, 301 (1983) (quoting Orloff v. Willoughby, 345 U.S. 83, 94 (1953)).

The strategy and tactics employed on the battlefield are clearly not subject to judicial review. See, e.g., DaCosta v. Laird, 471 F.2d 1146, 1155-56 (2d Cir. 1973) (challenge to presidential directive to mine Vietnamese harbors and continue air and naval strikes presents a nonjusticiable political question). "The same considerations which preclude judicial ex-

amination of the decision to act must necessarily bar examination of the manner in which that decision was executed by the President's subordinates." Rappenecker v. United States, 509 F. Sup. 1024, 1030 (N.D. Cal. 1980). Not only do courts lack the expertise to evaluate military tactics, but they will often be without knowledge of the facts or standards upon which military decisions have been based. Id. at 1029 (alleged negligence in military action to free a captured vessel was nonjusticiable).

It matters not that the military decision here involves the defense of national borders rather than the projection of force abroad. The elementary canons of judicial caution are not limited to actions taken during actual wartime, but may extend to many other aspects of military operations. In declining to rule on the allegation that the training, weaponry and orders of a state National Guard program made inevitable the unnecessary use of fatal force, the Supreme Court declared:

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

So too does this case beckon courts into "complex, subtle, and professional [military] decisions," in-

volving here the identification and interception of potentially hostile aircraft in our air zones. The Court declined to be drawn into such discretionary military decisions in Boyle v. United Technologies Corp., 487 U.S. 500 (1988), where a Marine helicopter pilot's estate sued the government for an allegedly defective aircraft design. It recognized that selection of an appropriate design for military equipment was a function reserved for the armed forces because such decisions involved "not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." Id. at 511. To have permitted state tort law to enter and alter the equation would have been to allow judicial reappraisal of judgments that is constitutionally forbidden. Id.; see Varig Airlines, 467 U.S. at 814.

We likewise hold that Tiffany cannot reshape the national response to threats of hostile air attack through the mechanism of tort law. Because Tiffany failed to comply with federal regulations, NORAD confronted an unidentified aircraft which had entered an air defense zone initially undetected, and which was heading directly for the continental United States. The potential danger to American lives that such a scenario presents is apparent. NORAD was forced to initiate protective measures.

The executive and legislative branches have accorded NORAD the authority and the substantial responsibility of protecting the nation's borders. Thus, NORAD is the party that must balance the "many technical, military, and even social considerations" when developing a system of identifying unknown aircraft. Boyle, 487 U.S. at 511. It must weigh the necessity of precise identification against the result-

ing risks to its own pilots' safety and it must balance the need to protect the civilian population on the ground with the need to protect civilian aircraft which enter into air defense zones without filing flight plans.

Such delicate appraisals of relative dangers were not ultimately consigned by Congress to the courts. Courts are not in a position to dictate to a branch of the Department of Defense how it should react when it faces unknown and potentially hostile aircraft. Myriad possibilities for mischievous judicial inquiry abound: whether planes should have been sent at all; the proper number of planes; the routes they flew; the angles of the intercepts; the correct distance from the target; the proper reaction to weather conditions; the quality of the on-board radar system; the compatibility of communications systems. The list of inquiries is virtually endless and the umbrella of negligence would encompass them all. Courts cannot impose their own concept of "the prudent intercept" on NORAD. Judges have no "judicially discoverable and manageable standards for resolving" whether necessities of national defense outweigh risks to civilian aircraft. Baker v. Carr, 369 U.S. at 217. Nor can we even "undertake independent resolution without expressing lack of the respect due coordinate branches of government." Id. Any judgment we might render would lay upon NORAD a strata of tort law which would be both capricious and confining in its impact.

III.

Tiffany argues nonetheless that this court can award her a recovery without expressing any lack of respect for coordinate branches of government. In her view, the protected decisions with which we should

not interfere have already been made in the form of NORAD and USAF regulations, manuals, and procedures. Thus, she contends, the court can inquire whether government agents followed those regulations without exercising authority to which it is not entitled. See Berkovitz v. United States, 486 U.S. 531, 536 (1988). An alleged failure to follow regulations is not only justiciable, she believes, but presents a case of actionable negligence.

Three reasons counsel rejection of this argument. First, the mere fact that NORAD established routine operating procedures cannot convert this dispute into a justiciable issue when so many other factors counsel against judicial intervention. Second, we do not believe that each NORAD or Air Force regulation that designates internal operating procedures automatically gives rise to an actionable duty in tort to comply with them. Third, an examination of the regulations in question reveals that they actually reserve a great deal of discretion for the parties who must conduct the defensive maneuvers.

First, to say that because internal regulations exist, the barriers to judicial involvement are removed is too simple a proposition. Instead, we must inquire "into the precise facts and posture of the particular case" while noting "the impossibility of resolution by any semantic cataloguing." Baker v. Carr, 369 U.S. at 217. Even if we were to agree that the regulations provided standards against which NORAD's conduct could be measured, that conclusion would hardly compel that the courts do so if other "prudential considerations" counseled against it. Goldwater v. Carter, 444 U.S. at 998 (Powell, J., concurring).

Here, we conclude that precisely such other powerful factors foreclose judicial entertainment of Tif-

fany's assertions. Those factors have been discussed at length in the preceding section and shall not be repeated here. Simply put, NORAD must have some freedom to design and to conduct missions with regard to hostile aircraft without fear that courts will afterwards assess damages in the belief that the mission might have been accomplished better. The presence of regulations does not change the reality that legislative and executive oversight of these particular military missions is to be preferred to that of the judiciary. Each intercept may present a unique situation and demand a different response dependent not only upon factors such as the prevailing weather conditions and available information, but upon the state of foreign relations and international tensions. In adapting to such variable circumstances, the extent of compliance with relevant NORAD manuals and regulations may be anything but clear. Indeed, determining the extent of compliance with operating procedures and regulations can itself be an endlessly argumentative exercise. This determination must be in the first instance a matter for military judgment, subject always to the "power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system . . . ." Gilligan v. Morgan, 413 U.S. at 10.

We do not hold, of course, that any time a branch of the military asserts a national defense interest to justify its acts, the court must avert its eyes. The military does not enjoy a blanket exemption from the need to proceed in a non-negligent manner. When conducting training exercises, for example, or acting in a civilian arena, national defense interests may be more remote and the military faces different restrictions. See, e.g., Peterson v. United States, 673 F.2d

237 (8th Cir. 1982) (B-52 plane on training mission liable for flying too low in altitude); Ward v. United States, 471 F.2d 667 (3d Cir. 1973) (Air Force might be liable for negligently causing sonic booms). Nor do we here address the situation where a civilian pilot properly filed and activated a flight plan and the government negligently misplaced it. Those are different circumstances from ones where actual military force was initiated to investigate a potentially hostile aircraft.

We also cannot accept Tiffany's assumption that NORAD regulations automatically create an actionable duty in tort towards civilans. Tiffany does not argue, as did the plaintiffs in Berkovitz v. United States, 486 U.S. 531 (1988), that the government violated any federal laws contained either in statutes or in formal published regulations such as those in the code of Federal Regulations. "There can be no doubt that the mandate of a federal statute is a far stronger foundation for the creation of an actionable duty . . . than [an] administrative directive . . . ." Zabala Clemente v. United States, 567 F.2d 1140, 1150 (1st Cir. 1977). As the First Circuit explained while addressing whether FAA inspectors owed a duty to the public:

Plaintiffs cannot use the implicit sovereignty of the government to argue that all its internal communications establish standards of care similar to those created by duly promulgated laws of general application. Not all acts and orders of the United States government are so sovereign that they must be treated as commands which create legal duties or standards, the violation of which involves breaking the law. A considerable part of the government's conduct is in the context of an employer-employee relationship, a

relationship which includes reciprocal duties between the government and its staff, but not necessarily a legal duty to the citizenry.

Zabala Clemente, 567 F.2d at 1144. The court finally concluded that an order to FAA staff to conduct inspections, although mandatory, did not create an actionable duty to passengers: "we do not believe the Federal Tort Claims Act was intended to expose the government to such limitless liability . . . ." Id. at 1146.

Similarly, when Soviet military aircraft shot down a commercial airliner that had strayed into Soviet air space, relatives of passengers killed in the crash argued that NORAD should have warned the airliner of its position. The alleged duty to warn was based on Alaskan NORAD Region/Alaskan Air Command Regulation 60-1, which provided: "If it looks like an aircraft is lost or may enter the Alaskan non-free flying area . . . tell the nearest Federal Aviation Administration Flight Service Station for civil aircraft. . . ." In re Korean Air Lines Disaster of September 1, 1983, 646 F. Supp. 30, 34 (D.D.C. 1986). While it was undisputed that the regulation was an internal military directive that was binding on military personnel, the court held that "the testimony of personnel working on an operational level that they believed they were required to obey Reg. 60-1 does not support Plaintiffs' contention that the United States owed a duty to Plaintiffs' decedents." Id. The regulation was simply inadequate to show that the United States had "assumed ultimate responsibility for rescuing civilian flights." Id. at 34-35.

Tiffany has similarly not shown that NORAD guaranteed through operational procedures the safety of all civilian aircraft which enter an ADIZ without a flight plan. On the contrary, it is difficult to see

how the government actually could make such a guarantee. Moreover, to base tort liability in this situation on a failure to follow internal regulations would have few positive outcomes. NORAD might well respond by setting fewer procedures and regulations if each could give rise to civilian tort suits. Such action could only result in increased confusion and a loss of military efficiency. Nor would any worthwhile goals be achieved if NORAD were to state in boilerplate throughout its regulations that the rules are not meant to create tort duties, or if NORAD responded by promulgating regulations of a most permissive nature, designed to retain maximal flexibility. Reflection upon such consequences underscores the dangers of the intrusion of undue tort liability into NORAD's regulatory calculus.

Finally, many of the regulations that Tiffany argues were not followed actually preserve significant discretion for the necessary actors. For example, NORAD Regulation 55-14 (May 5, 1980) addresses the procedures for identification of air traffic:

> Once intercept action has been initiated against an "Unknown," positive visual recognition will be completed within tactical and safety limitations, unless the track can be positively reclassified "Friendly" by other means prior to intercept. If there is reasonable doubt as to validity of identification information . . . visual recognition will be completed.

NORAD Regulation 55-14 ¶ 6.b.4 (May 5, 1980). Large areas of discretion reside within the above directive. The regulation does not explain what circumstances might give rise to "reasonable doubt" about the validity of information, for example.

Perhaps more importantly, the duty to identify rests on the classification of the target aircraft as an "unknown," and that classification is discretionary.

The regulation lists many methods by which a plane can be declared "friendly" but does not require NORAD to so declare it even when the conditions have been fulfilled. Instead the methods are merely permissive:

A track may be classified "Friendly" if it follows a plan of flight in accordance with a prior arrangement between the ADCF concerned and the aircraft operator[;] . . . voice authentication over air/ground channels . . . may be used as a means of determining the "Friendly" identity of military aircraft[;] . . . [if] there is a strong possibility that the aircraft in question should correlate with a flight plan received by the NORAD system, the track in question may be declared "Friendly" if it is transmitting a MODE 3/A code assigned by FAA/TC[;] . . . Positional information obtained [via ATC agencies] may be used to establish a reclassification of "Friendly."

Id. ¶¶ 6.a.4, 6.a.6 to 6.a.8 (emphasis added). Not only are the classification requirements permissive; they are also fluid. Aircraft can be relabeled based on subsequent information received at any time. Id. ¶ 5.c.1. Paragraph 6.b.2 allows controllers to classify as "unknown" "any track, regardless of its location, creating suspicion as to its intent by reason of course, speed, altitude, radio/telephone procedures, maneuvers, flight size, ECM activity, or other abnormality to an extent that further investigation is deemed advisable." These regulations make clear that NORAD's categorization of aircraft and decisions as to the necessity of completing a visual identification are discretionary in a way that would likely be immunized, even under Tiffany's proposed analysis.

Many of the tactics employed to conduct the intercept are similarly discretionary in nature. An attachment to NORAD Regulation 55-14 instructs that "VFR and IFR interception patterns will be in accordance with standard tactics prescribed by the component command to whom the interceptor is assigned." Attachment 2 ¶ 1.e. Thus tactics may vary from command to command. In addition, the United States Air Force Interceptor Weapons Instruction Manual 51-14 (May 15, 1978) informs pilots to "keep in mind that there should never be a 'standard tactic and that the areas mentioned here are more aimed at thought processes than actual solutions." Ch. 6 (Visual Identification Intercepts) 6-1. The district court observed that pilots also retain the authority to "call a Judy," or to take control of the intercept through use of on-board radar. Finally, Regulation 55-14 ¶ 9 explains that "NORAD/ADCOM region commanders are authorized to supplement this regulation, as required, to establish specific responsibilities and operating procedures for their area."

To hear Tiffany describe an intercept, the whole operation is simply a rote mechanical exercise. Actually it is in significant respects flexible and judgmental in nature. Tiffany's assertions that NORAD was negligent in not classifying the Baron as "friendly" more quickly and in approaching it at a wrong angle, for example, fall into the realm of discretion reserved by the regulations themselves.

Therefore, the presence of NORAD regulations which speak to intercept procedures does not change our analysis. We continue to believe that the issues raised by Tiffany are not for resolution by the courts, but are best left to those branches of government

whose expertise is greater and whose political accountability is more direct.

IV.

It should be obvious that NORAD's military strategy does not project midair collisions as an element of the nation's defense. It should also be apparent that NORAD possesses a keen interest in the safety of its own personnel and in that of other pilots and passengers. Because manned intercept procedures will always place NORAD's own reputation, equipment, and personnel at risk, the intercept system itself has incentives to assure the safety of those who use the air. To redesign the incentives through tort law, however, holds hazards of its own. This tragedy occurred in midair; an aircraft undetected by a risk-averse defense system might one day visit a different sort of disaster, as lamentable in its own way as this one is.

The judgment of the district court is reversed and the case is remanded with directions to dismiss. The government's counterclaim is also dismissed.

REVERSED AND REMANDED

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No. 90-1360

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SEA-LAND SERVICE, INC.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONER

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INTRODUCTION

In the Brief for the United States in Opposition to Sea-Land's Petition for a Writ of Certiorari ("Opp. Brief"), relying on the results in several cases decided in its favor, the United States contends that "there is nothing anomalous in the recognition of the [discretionary function exception] in the [SAA], even in the absence of an express exception" (Opp. Brief at 8). In thus relying on caselaw, however, the United States completely ignores a fundamental flaw in its own analysis and that of the several circuit courts of appeals which have concluded that the separation of powers doctrine provides an appropriate basis for imputing the discretionary

function exception into the Suits in Admiralty Act ("SAA"), 46 U.S.C. App. § 741 *et seq.* The Solicitor General simply fails to address the separation of powers arguments in the petition for certiorari.

For additional support, the United States has submitted a Supplemental Brief ("Supp. Brief") in which it has identified a recent Fourth Circuit opinion, *Tiffany v. United States*, 1991 U.S. App. LEXIS 7819 (4th Cir. April 30, 1991). The court in *Tiffany* continues and compounds the flawed analytic approach of the other circuit courts of appeals and relies upon principles which have no application to the proper construction of the SAA.

ARGUMENT

A. SEPARATION OF POWERS DOCTRINE

Rather than address the constitutional arguments raised by petitioner, the United States simply adopts the reasoning of the various courts of appeals which have held that the SAA, which acts as a general waiver of the sovereign immunity of the United States with respect to certain maritime claims, does not waive the government's sovereign immunity with respect to claims arising from the performance of discretionary functions (*See* Opp. Brief at 6). The United States concludes that this result is warranted because of "the need to avoid judicial intrusion into executive policy making [which] implicates important principles of separation or powers" (Opp. Brief at 9). Without any further analysis or explanation of how the discretionary function exception protects the principles embodied in the separation of powers doctrine, the United States suggests that "prevailing interpretation of the SAA gives due weight to those considerations" (Opp. Brief at 10).

As demonstrated in petitioner's argument to the Court, "[p]rinciples of separation of powers, as definitively announced by this Court, have no application to the proper construction of the SAA" (Petition at 15). The doctrine has

been utilized by this Court to review the constitutionality of congressional legislation in two discrete circumstances: (1) when a particular statute may violate specific textual provisions of the Constitution which vest authority in another branch; and (2) when a particular statute may violate non-textual, functional principles of separation of powers. As demonstrated in the petition filed by Sea-Land, neither of these circumstances are present in this case (*See* Petition at 15-18). The United States does not dispute that assertion.

Reliance upon the principles of separation of powers as a basis for reading a discretionary function exception into the SAA is an aberrational doctrinal development which contravenes not only the literal language of the statute but also this Court's recent decision in *United States v. Gaubert*, 59 U.S.L.W. 4244 (U.S. March 26, 1991), *rev'g* 885 F.2d 1284 (5th Cir. 1989). In *Gaubert*, the Court considered the origins of the discretionary function exception in the Federal Tort Claims Act, 28 U.S.C. § 2680(a). The Court stated that "when properly construed, the exception 'protects only governmental actions and decisions based on considerations of public policy.' " *Id.* at 4246 (quoting *Berkovitz v. United States*, 486 U.S. 531 (1988)). There is no suggestion that the exception was developed to grant immunity for negligent acts occurring in circumstances unrelated to policy-making. Moreover, nowhere in the Court's opinion is there any suggestion that the discretionary function exception was designed as a guardian of the doctrine of separation of powers. *See id.* at 4246-47. The Court must stop the continued extension of non-existent legal doctrines and the distortion of unambiguous statutes.

B. CIRCUIT COURT RULINGS

In its Supplemental Brief, the United States cites the case of *Tiffany v. United States*, 1991 U.S. App. LEXIS 7819 (4th Cir. April 30, 1991) (Supp. Brief at 1-25a), and states that this opinion "lends additional support to our position that there is no conflict between the Fourth Circuit and other circuits that calls for this Court's review" (Supp. Brief at 2).

Yet, the Fourth Circuit in *Tiffany* did not overrule its decision in *Lane v. United States*, 529 F.2d 175 (4th Cir. 1975), which held that a discretionary function exception could not be implied into the SAA (Petition at 22). Rather, in *Tiffany* the court merely recognized the existence of a discretionary function exception to the SAA "in some circumstances" (Supp. Brief at 12a fn.). None of the other courts of appeals which have ruled on this issue has expressed the view that a discretionary function exception may be selectively applied by the courts in maritime actions brought against the United States. Therefore, the Fourth Circuit itself has now reaffirmed the continued validity of *Lane* in some maritime actions brought pursuant to the SAA. Accordingly, despite the government's assertion to the contrary, there remains a real conflict which needs to be resolved by this Court.

Even if it could be said that the Court of Appeals for the Fourth Circuit has now aligned itself with the other courts of appeals on the discretionary function issue, a review of the *Tiffany* opinion indicates that the court merely adopted the holdings of the other circuits and did not independently address how the separation of powers doctrine, as developed by this Court, requires writing a discretionary function exception into the SAA. Thus, the Fourth Circuit's opinion actually supports petitioner's request that this Court review this issue.

In *Tiffany*, the plaintiff sought to recover damages in tort from the United States for negligence by the military in conducting defensive intercept maneuvers. The court began its analysis by considering the relation between separation of powers principles and the relevant federal statutes (Supp. Brief at 10a). Noting that the SAA allowed the action to proceed without a sovereign immunity bar, the court went on to consider whether the separation of powers doctrine would nevertheless prevent the courts from exercising jurisdiction under the SAA in certain circumstances (Supp. Brief at 10-11a). In defining the relevant considerations informing the separation of powers analysis, the court did not refer either to specific textual provisions of the Constitution or to the

non-textual functional principles of separation of powers. Instead, the court listed several factors relevant to the determination of justiciability of political questions (Supp. Brief at 10-11a) (*citing Baker v. Carr*, 369 U.S. 186, 217 (1962)), and concluded that if resolution of the issues presented offended these or other prudential considerations, the court would deem the issues nonjusticiable. In addition, the court noted that "[e]ach circuit that has considered the matter has concluded that actions brought under the SAA which would require the court to re-examine discretionary acts taken by the government must be dismissed" (Supp. Brief at 12-13a) (listing citations to the several courts of appeals). In light of these factors, the Fourth Circuit concluded that independent judicial review of administrative and legislative policy making decisions "would be 'intolerable under our constitutional system of separation of powers' " (Supp. Brief. at 13a) (*quoting In Re Joint E. and S. Dists. Asbestos Litigation*, 891 F.2d 31, 35 (2d Cir. 1989)). In so holding, the court memorialized the extraordinary proposition that it would be *unconstitutional* for Congress to provide for judicial review of a military decision which results in the destruction of a friendly aircraft.

The *Tiffany* opinion, like the opinion below of the Third Circuit, continues the distortion of a clear and unambiguous statute and clearly defined principles relating to the separation of powers doctrine. Only this Court can protect Congress and its constituency from aggrandizing acts of the federal executive uncontrolled by any defined principle of law.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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